TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 902.

AMERICAN EXPRESS COMPANY, GEORGE C. TAYLOR, INDIVIDUALLY AND AS PRESIDENT OF THE AMERICAN EXPRESS COMPANY, AND WELLS FARGO & CO., PLAINTIFFS IN ERROR,

vs.

THE STATE OF SOUTH DAKOTA *EX REL.* CLARENCE C. CALDWELL, AS ATTORNEY GENERAL OF THE STATE OF SOUTH DAKOTA, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA.

FILED JANUARY 27, 1917.

(25,732)

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 30, 1917.

Summons.

In the Supreme Court of the State of South Dakota.

STATE OF SOUTH DAKOTA ex Rel. CLARENCE C. CALDWELL, as Attorney General, and John J. Murphy, P. W. Dougherty, and W. G. Smith, as and Constituting the Board of Railroad Commissioners of the State of South Dakota, Plaintiff,

vs.

AMERICAN EXPRESS COMPANY and GEORGE C. TAYLOR, Individually and as President of the American Express Company, and the Wells Fargo & Company, a Corporation, Defendants.

The State of South Dakota sends greetings to the defendants above named:

You and each of you are hereby summoned and required to answer the complaint of the above named plaintiff, a copy whereof is hereunto attached and herewith served upon you, and to serve a copy of your answer upon the subscribers, attorneys for the plaintiff, at their offices in the Capitol Building, in the City of Pierre, Hughes County, South Dakota, within thirty days after the service of this summons upon you, exclusive of the day of such service, and you are hereby notified that if you fail to appear and answer the complaint within the time stated, the plaintiff will apply to the court for the relief demanded in said complaint and for its costs and disbursements in this action.

Dated at Pierre, South Dakota, this 11th day of September, 1916.

(Signed) CLARENCE C. CALDWELL,
Attorney General, and
(Signed) OLIVER E. SWEET,
Assistant Attorney General;
(Signed) P. W. DOUGHERTY,
Attorneys for Plaintiff.

2 *Complaint.*

In the Supreme Court of the State of South Dakota.

STATE OF SOUTH DAKOTA ex Rel. CLARENCE C. CALDWELL, as Attorney General, and John J. Murphy, P. W. Dougherty, and W. G. Smith as and Constituting the Board of Railroad Commissioners of the State of South Dakota, Plaintiff,

vs.

AMERICAN EXPRESS COMPANY and GEORGE C. TAYLOR, Individually and as President of the American Express Company, and the Wells Fargo & Company, a Corporation, Defendants.

The Plaintiff above named, the State of South Dakota, on the relation of Clarence C. Caldwell, as Attorney General, and John J. Murphy, P. W. Dougherty, and W. G. Smith, as and constituting the Board of Railroad Commissioners of the State of South Dakota, complains, alleges, and shows to the court:

I.

That Clarence C. Caldwell is the duly elected, qualified, and acting Attorney General of the State of South Dakota, and that John J. Murphy, P. W. Dougherty, and W. G. Smith are and each of them is a duly elected, qualified, and acting Railroad Commissioner of the State of South Dakota, and that collectively they are and constitute the Board of Railroad Commissioners of the State of South Dakota, and that the said Clarence C. Caldwell as Attorney General, and the said John J. Murphy, P. W. Dougherty, and W. G. Smith as and constituting the Board of Railroad Commissioners of said State, bring this action by the authority of the statutes and laws of this state as well as for and on behalf of all of the people of this state.

3 II.

That the American Express Company is a voluntary partnership or association of individuals organized under Articles of Agreement between its members pursuant to the common law of the State of New York, and has and maintains its principal place of business in New York City, in the state of New York; that said association is composed of more than three thousand members or shareholders and that they are too numerous to be joined as parties hereto and it is impracticable to bring all of them before the court for the reason that they are widely scattered and live in different parts of more than fifteen different states of the United States; that George C. Taylor, the defendant above named, is the president and a member and shareholder of the said American Express Company and that under the said articles of agreement and the laws of the State of New

York, he is as such president authorized to represent the said partnership or association and all its members and is duly authorized to sue and be sued for and on behalf of the said American Express Company and the several individuals composing the same; that the Wells Fargo & Company is a corporation organized and existing under and by virtue of the laws of the state of Colorado, and is authorized to transact business as a foreign corporation under the laws of the state of South Dakota; that the said American Express Company and George C. Taylor, its president, and the Wells Fargo & Company are common carriers engaged in the transportation of property by express between points within the state of South Dakota, and as such common carriers are subject to the laws of the state of South Dakota.

III.

That heretofore and on or about the 2nd day of May, 1911, the Board of Railroad Commissioners of the state of South Dakota, under and pursuant to the provisions of Chapter 152 of the Session Laws of 1911, in an order made and entered at a regular
4 session of said Board, and within sixty days after the said act went into effect, prepared for each of the express companies doing business in this state at that time a uniform schedule or schedules of reasonable maximum rates of charges for the transportation of express freight between stations within this state over lines of railway wholly within this state, and the said rates did not exceed seventy per cent of the lowest rates which were in force for the transportation of express freight over any line of railway between stations within this state on the first day of January, 1909; that the said order contained a provision that the same should become effective on the 15th day of May, 1911, and was before that date duly served upon the above named defendant express companies and the other express companies at that time doing business in this state; that upon the issuance of said order and the schedule or schedules of express rates therein contained the defendant express companies and others brought suits in the District Court of the United States for the District of South Dakota, praying for injunctions against the enforcement of the said order and of the schedule or schedules of express rates therein contained, alleging that the rates, fares and charges therein prescribed were unreasonable and confiscatory; that the defendant express companies and others presented to said District Court applications for temporary injunctions restraining the enforcement of said order and the schedule or schedules of express rates therein contained pending the suit, and after a full hearing on said applications the same *was* on or about the 7th day of September, 1911, by the court in all things denied, and the defendants and other express companies parties to said suits were granted two weeks or until September 21, 1911, to put said rates into effect; that this suit has never been brought on for trial upon the merits and is still pending in the said District Court of the United States; that no appeal has ever been taken from the order of the court denying the

application of defendants and others for the said temporary
5 injunctions; that on the other hand, after the issuance of said order by the district court of the United States, the defendant express companies and others adopted and put into effect and published and established as their own and have ever since that time observed and maintained a schedule or schedules of intrastate express rates in this state conforming in every way to the said order made and entered by the Board of Railroad Commissioners and to the schedule or schedules of express rates therein contained, and that the said order of the Board of Railroad Commissioners and the schedule or schedules of express rates therein contained or the schedule or schedules of express rates so adopted, published, and established by the defendant express companies and others have not been modified or changed and the same remain in force and effect at the present time; that the defendant express companies have never applied to the Board of Railroad Commissioners of this state for any change or modification in their intrastate express rates that were ordered into effect and established by the Board in the manner aforesaid, except as hereinafter shown.

IV.

That thereafter and on or about the 27th day of July, 1916, an informal conference was held between the Board of Railroad Commissioners of this state, representatives of the defendant express companies and of other express companies doing business in this state and of merchants and shippers residing and engaged in wholesale and jobbing business at the cities of Sioux Falls, Mitchell, Aberdeen, Watertown, and Yankton, South Dakota; that at said informal conference representatives of the express companies proposed that they be permitted to put into effect and to apply on the transportation of property by express between all express stations within the state of South Dakota, on the lines of all the different railways, rates, fares, charges, classifications, rules, regulations, and practices conforming in amounts, terms, conditions and all other re-
6 spects to the rates, fares, charges, classifications, rules, regulations, and practices effective and applying on the intrastate transportation of property by express between points in adjoining states and between points in the adjoining states and points in South Dakota; that at the same time and place representatives of the express companies present further stated that in the event they should not be permitted to establish the current interstate rates, fares, charges, classifications, regulations, rules and practices upon traffic moving between all points within the state of South Dakota, that they would on or before the 15th day of August, 1916, put into effect and apply on intrastate transportation of property by express between the cities of Sioux Falls, Mitchell, Aberdeen, Watertown, and Yankton, and all other points and stations of the defendant express companies in the state of South Dakota, the current and existing interstate rates, fares, charges, classifications, rules, regulations and practices; that the result of the establishment of the rates,

fares, and charges, rules, regulations or practices so proposed by the express companies would have been in many instances to change and advance the rates, fares, and charges and compensation of the defendant express companies for the intrastate transportation of property by express between the points wholly within the state of South Dakota; that the Board of Railroad Commissioners believing and presuming that the schedule or schedules of express rates promulgated in the order issued May 2nd, 1911, were just, reasonable, and non-discriminatory rates and that the rates, fares, and charges proposed to be put into effect by the express companies and others were excessive, unreasonable, and unjust as applied to the intrastate transportation of property by express in South Dakota, and being without sufficient information to determine finally and conclusively what rates, fares, charges, rules, regulations, and practices would be fair, just, and reasonable at the present time and under present conditions to apply to express traffic between points within the state of South Dakota, intrastate, refused to approve, allow
7 or permit the proposed increases in express rates to become effective either between all points on the different lines of railway within the state of South Dakota, or between the five cities above named and all other stations of the defendant express companies in this state.

V.

That thereafter and on or about the 5th day of August, 1916, the board of Railroad Commissioners by an order duly made and entered determined to enter upon an investigation of the rates, fares, charges, classifications, rules, regulations, and practices of the express companies engaged in the transportation of express freight wholly between points within the state of South Dakota, for the purpose of enabling the Board of Railroad Commissioners to determine what would be just, reasonable, and proper rates, fares, charges, classifications, rules, regulations, and practices to apply to intrastate express transportation as aforesaid; and in furtherance of said investigation the Board of Railroad Commissioners called a hearing to be held before the Board at their offices in the Capitol Building, in the city of Pierre, South Dakota, on the 4th day of December, 1916, and thereupon duly served said order and a notice of the time and place of said hearing upon the defendants and all other express and railway companies doing business in this state.

VI.

That thereafter and on the 25th day of August, 1916, the defendant express companies by their joint agent, F. G. Airy, presented for filing in the office of the Board of Railroad Commissioners certain tariffs, tables, classifications, rules and regulations, proposing increases and advances in their present prevailing and established rates, fares and charges for the intrastate transportation of property by express between the cities of Sioux Falls, Mitchell, Aberdeen,

8 Watertown, and Yankton, South Dakota, and all other points and stations of the defendant companies within the state of South Dakota; that the said tariffs were issued by F. G. Airy, the said joint agent of the defendant express companies and were dated August 15, 1916, and were issued to become effective September 15, 1916; that thereupon by a resolution duly and regularly passed and adopted, the Board of Railroad Commissioners refused to file the said tariffs, tables, classifications, rules or regulations or any of them, and refused to approve or allow the changes or advances in intrastate express rates, fares and charges therein proposed to become effective for the reasons, as stated in said resolution, that the said tariffs, tables, classifications, rules or regulations, or any of them proposing changes and advances in the existing and prevailing regularly and lawfully established rates, fares, and charges, had not been filed, printed, or published in time to give to the Board of Railroad Commissioners or to the public thirty days notice of the time when and the fact that the same would become effective, before the effective date named therein, and that the said express companies had not obtained the Board's approval or allowance of the rates, fares, charges, classifications, rules and regulations contained therein; that certified copies of said resolution were thereupon forwarded to each of the defendant express companies and to F. G. Airy, their joint agent; and that the said resolution duly passed and adopted and forwarded to the defendants as aforesaid contains a statement of the grounds and reasons for the Board's refusal to file the said tariffs, tables, classifications, rules or regulations or to permit the same to become effective or to approve or to allow the changes in the rates, fares, charges, rules, regulations, and practices therein proposed to become effective upon intrastate express business in this state, and also contains a complete list of the said tariffs, tables, classifications, rules, regulations, and practices, as follows:

Official Express Classification No. 24, So. Dak., R. C. No. 8, issued August 15, 1916, effective September 15, 1916; Local and Joint Schedule of First and Second-Class Express Rates, No. 2, So. Dak. R. C. No. 9, issued August 15, 1916, effective September 15, 1916,

9 Joint Directory of Express Stations Showing Block number and sub-block letters designating their locations, So. Dak. R. C. No. 10, issued August 15, 1916, effective September 15, 1916; Joint Directory of Collection and Delivery Limits of Express Stations, So. Dak R. C. No. 11, issued August 15, 1916, effective September 15, 1916; Local and Joint Block Tariff containing express rate tables from Block 423, So. Dak. R. C. No. 12, issued August 15, 1916, effective as to intrastate traffic September 15, 1916; Local and Joint Block Tariff containing express rate tables from Block 424, So. Dak. R. C. No. 13, issued August 15, 1916, effective as to intrastate traffic September 15, 1916; Local and Joint Block Tariff containing express rate tables from Block 425, So. Dak. R. C. No. 14, issued August 15, 1916, effective as to intrastate traffic September 15, 1916; Local and Joint Block Tariff containing express rate tables from Block 426, So. Dak. R. C. No. 15, issued August 15, 1916; effective as to intrastate traffic September 15, 1916; Local and Joint

Block Tariff containing express rate tables from Block 427, So. Dak., R. C. No. 16, issued August 15, 1916, effective as to intrastate traffic September 15, 1916; Local and Joint Block Tariff containing express rate tables from Block 428, So. Dak. R. C. No. 17, issued August 15, 1916, effective as to intrastate traffic September 15, 1916; Local and Joint Block Tariff containing express rate tables from Block 429, So. Dak. R. C. No. 18, issued August 15, 1916, effective as to intrastate traffic September 15, 1916; Local and Joint Block Tariff containing express rate tables from Block 522, So. Dak. R. C. No. 19, issued August 15, 1916, effective as to intrastate traffic September 15, 1916; Local and Joint Block Tariff containing express rate tables from Block 523, So. Dak. R. C. No. 20, issued August 15, 1916, effective as to intrastate traffic September 15, 1916; Local and Joint Block Tariff containing express rate tables from Block 524, So. Dak. R. C. No. 21, issued August 15, 1916, effective as to intrastate traffic September 15, 1916; Local and Joint Block Tariff containing express rate tables from Block 525, So. Dak. R. C. No. 22, issued August 15, 1916, effective as to intrastate traffic September 15, 1916; Local and Joint Block Tariff containing express rate tables from Block 526, So. Dak. R. C. No. 23, issued August 15, 1916, effective as to intrastate traffic September 15, 1916; Local and Joint Block Tariff containing express rate tables from Block 527, So. Dak. R. C. No. 24, issued August 15, 1916, effective as to intrastate traffic September 15, 1916; Local and Joint Tariff containing express rate tables from Block 528, So. Dak. R. C. No. 25, issued August 15, 1916, effective as to intrastate traffic September 15, 1916; Local and Joint Tariff containing express rate tables from Block 529, So. Dak. R. C. No. 26, issued August 15, 1916, effective as to intrastate traffic September 15, 1916; Local and Joint Tariff containing express rate tables from Block 621, So. Dak. R. C. No. 27, issued August 15, 1916, effective as to intrastate traffic September 15, 1916; Local and Joint Tariff containing express rate tables from Block 622, So. Dak. R. C. No. 28, issued August 15, 1916, effective as to intrastate traffic September 15, 1916; Local and Joint Tariff containing express rate tables from Block 623, So. Dak. R. C. No. 29, issued August 15, 1916, effective as to intrastate traffic September 15, 1916; Local and Joint Tariff containing express rate tables from Block 624, So. Dak. R. C. No. 30, issued August 15, 1916, effective as to intrastate traffic, September 15, 1916; Local and Joint Tariff containing express rate tables from Block 625, So. Dak. R. C. No. 31, issued August 15, 1916, effective as to intrastate traffic September 15, 1916; Local and Joint Tariff containing express rate tables from Block 626, So. Dak. R. C. No. 32, issued August 15, 1916, effective as to intrastate traffic September 15, 1916; Local and Joint Tariff containing express rate tables from Block 627, So. Dak. R. C. No. 33, issued August 15, 1916, effective as to intrastate traffic September 15, 1916; Local and Joint Tariff containing express rate tables from Block 628, So. Dak. R. C. No. 34, issued August 15, 1916, effective as to intrastate traffic September 15, 1916; Local and Joint Tariff containing express rate tables from Block 629, So. Dak. R. C. No. 35, issued August 15, 1916, effective as to intrastate traffic September 15, 1916; Local and

Joint Tariff containing express rate tables from Block 728, So. Dak. R. C. No. 36, issued August 15, 1916, effective as to intrastate traffic September 15, 1916; Local and Joint Tariff containing express rate tables from Block 729, So. Dak. R. C. No. 37, issued August 15, 1916, effective as to intrastate traffic September 15, 1916.

VII.

That notwithstanding the refusal of the Board of Railroad Commissioners to file the said tariffs, tables, classifications, rules, and regulations or to approve or to allow the same to go into effect, the defendant express companies are still proposing and threatening to and they will put the said unjust, unreasonable, discriminatory and unlawful rates, fares, charges, classifications, rules, regulations and practices into effect between the cities of Sioux Falls, Mitchell, Aberdeen, Watertown and Yankton and all other stations of the defendant express companies in the state of South Dakota, unless they are enjoined and restrained from so doing by order of this court; that such proposed, threatened and contemplated action by the express companies, will, as the plaintiff is informed and believes, be in direct contravention and violation of the provisions of Section 10 of Chapter 207 of the Laws of 1911, and acts amendatory thereof and supplementary thereto; will result in great and irreparable damage to shippers and merchants engaged in retail and jobbing business at the cities of Sioux Falls, Mitchell, Aberdeen, Watertown, and Yankton, and other points within the state of South Dakota, and will result in the establishment of express rates applying on intrastate transportation of property by express that will be higher on traffic moving between the five cities named and other stations of the defendant express companies within this state than those contemporaneously in effect between all other stations within the state of South Dakota.

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VIII.

That the State of South Dakota, in its sovereign capacity, as one of the States of the United States of America, has a direct financial interest in this action in this, to-wit: that the state of South Dakota, through its several departments, is a heavy shipper of express matter intrastate between stations in this state over the lines owned and operated by the defendant express companies, as well as over the lines owned and operated by the other express companies doing business in this state, not only between the cities of Aberdeen, Watertown, Sioux Falls, Mitchell, Yankton and other stations in the state of South Dakota, but also between many of the stations of the defendant and other express companies in this state, and that complainant is advised and believes and therefore alleges the fact to be, that if the defendant express companies be permitted to put into effect the proposed rates, charges, rules, regulations, classifications and practices which they threaten to put into effect on September 15, 1916, as applying on intrastate express traffic in this state, the express charges

to the state of South Dakota, and the shippers of this state will be increased by approximately 68.1%.

IX.

That the plaintiff is without any plain, speedy or adequate remedy at law for the wrongs threatened and complained of.

Wherefore, the plaintiff prays judgment that a temporary injunction be issued out of this court enjoining and restraining the defendants and each of them pending the final determination of this action from putting into effect or applying to intrastate transportation of property by express between the cities of Sioux Falls, Mitchell, Aberdeen, Watertown and Yankton, and all other points and stations of the defendant express companies within the state of South Dakota, the rates, fares, charges, classifications, rules, regula-
12 tions or practices proposed in the aforesaid tariffs, tables, classifications, rules and regulations issued on behalf of the defendant express companies by their joint agent, F. G. Airy, on August 15, 1916; and that upon the trial of this action the court issued an injunction permanently enjoining and restraining the defendant express companies and each of them from putting into effect the said tariffs tables, classifications, rules, regulations or practices or any of the rates, fares or charges therein specified between the said five cities in the state of South Dakota, and other stations of the defendant express companies in this state, and from putting into effect or applying on intrastate transportation of property by express between any points in this state, rates, fares, charges or any classifications, rules, regulations or practices that will result in rates, fares and charges greater or higher than the maximum rates or charges for the transportation of express freight between stations within this state over lines of railway wholly within this state specified and contained in the order made and entered by the Board of Railroad Commissioners of this state, pursuant to the provisions of Chapter 152 of the Session Laws of 1911, on the 2nd day of May, 1911, or in the schedule or schedules contained in the said order, unless or until a schedule of express rates shall have first been submitted to the Board of Railroad Commissioners of this state, and has been regularly approved and allowed by said Board in conformity to the laws of the state of South Dakota; that the plaintiff- have such other and further relief as to the court may seem just and equitable and that it be awarded its costs and disbursements in this action.

(Signed) CLARENCE C. CALDWELL,
Attorney General;

(Signed) OLIVER E. SWEET,
Assistant Attorney General;

(Signed) P. W. DOUGHERTY,
Attorneys for Plaintiff.

13 STATE OF SOUTH DAKOTA,
County of Hughes, ss:

P. W. Dougherty being first duly sworn deposes and says: that he is a duly elected, qualified and acting Railroad Commissioner of the state of South Dakota, and is a member of the Board of Railroad Commissioners of this state, and as such is one of the relators in the action entitled in the foregoing complaint; that he has read said complaint, understands the same and knows of his own knowledge that the same is true except as to those matters therein stated upon information and belief, and as to those matters that he believes it to be true.

(Signed) P. W. DOUGHERTY.

Subscribed and sworn to before me this 11th. day of September, 1916.

(Signed) H. A. USTRUD,
Notary Public, Hughes County, S. D.

13½ STATE OF SOUTH DAKOTA,
In Supreme Court, ss:

STATE OF SOUTH DAKOTA ex Rel. CLARENCE C. CALDWELL et al.,
Plaintiff.

vs.

AMERICAN EXPRESS COMPANY et al., Defendants.

I, E. F. Swartz, Clerk of the Supreme Court in and for the State of South Dakota, do hereby certify that the foregoing pages numbered from 1 to 5 inclusive, contain a true and correct copy of the original order to show cause, issued on September 12, 1916, in the above entitled cause, and of the whole thereof, as the same now remains of record in said Supreme Court.

In witness whereof I have hereunto set my hand and affixed the Seal of said Court, at Pierre, this 12th day of September, A. D. 1916.

[Seal Supreme Court, State of South Dakota.]

E. F. SWARTZ,
Clerk of the Supreme Court,
By —— ——, *Deputy.*

14 In the Supreme Court of the State of South Dakota.

STATE OF SOUTH DAKOTA ex Rel. CLARENCE C. CALDWELL, as Attorney General and John J. Murphy, P. W. Dougherty, and W. G. Smith, as and Constituting the Board of Railroad Commissioners of the State of South Dakota, Plaintiff,

vs.

AMERICAN EXPRESS COMPANY and GEORGE C. TAYLOR, Individually and as President of the American Express Company, and the Wells Fargo & Company, a Corporation, Defendant.

Order to Show Cause.

Upon the complaint of the plaintiff in the above entitled action and the affidavit of P. W. Dougherty, a copy of which is hereunto attached, hereby referred to and made a part hereof; and the court being fully advised in the premises and good cause for this order appearing; now, therefore, on motion of Clarence C. Caldwell, Attorney General, Oliver E. Sweet, Assistant Attorney General, and P. W. Dougherty, as attorneys for the plaintiff,

It is hereby ordered by the Court, that the defendants show cause before this court at the Court Room thereof in the capitol building in the City of Pierre, in the County of Hughes, State of South Dakota, on Saturday, the 2nd day of October, 1916, at the hour of ten o'clock in the forenoon of that day, why they should not be enjoined and restrained, pending the final determination of this action, from putting into effect or demanding, or charging, collecting

15 or receiving rates for the intrastate transportation of property by express wholly within the State of South Dakota, between the cities of Sioux Falls, Mitchell, Aberdeen, Watertown and Yankton, South Dakota, and other points and stations of the defendant express companies in the State of South Dakota, or between any stations of the defendant express companies in this state that are higher than or in anywise exceed the rates and charges specified in that certain order made and entered by the Board of Railroad Commissioners of the State of South Dakota, on the 2nd day of May, 1911, and which finally went into full force and effect on intrastate express business in the State of South Dakota, on the 21st day of September, 1911, and which were thereafter adopted, published and put into effect by the defendant Express Companies, and which are now the rates in effect for the transportation of property by express between all points within the State of South Dakota, on the lines of the defendant Express Companies; and why they should not be restrained and enjoined pending the final determination of this action from putting into effect or applying to the intrastate transportation of property by express between the cities of Sioux Falls, Mitchell, Aberdeen, Watertown, and Yankton, and all other points and stations of the defendant express companies within

the State of South Dakota, those certain tariffs, tables, classifications, rules and regulations presented to the Board of Railroad Commissioners of the State of South Dakota, for filing in the office of said Board, on the 25th day of August 1916, to become effective on the 15th day of September, 1916, issued by F. G. Airy as the agent of the said defendant express companies, known and described as follows, to-wit:

Official Express Classification No. 24 So. Dak. R. C. No. 8 issued August 15, 1916, effective September 15, 1916; Local and Joint Schedule of first and second class express rates No. 2, So. Dak. R. C. No. 9, issued August 15, 1916, effective September 15,
16 1916; Joint Directory of Express Stations showing block numbers and sub-block letters designating their locations, So. Dak. R. C. No. 10, issued August 15, 1916, effective September 15, 1916; Joint Directory of Collection and Delivery limits of express stations, So. Dak. R. C. No. 11, issued August 15, 1916, effective September 15, 1916; Local and Joint Block Tariff containing express rate tables from block 423, So. Dak. R. C. No. 12, issued August 15, 1916, effective as to intrastate traffic September 15, 1916; Local and Joint Block Tariff containing express rate tables from Block 424, So. Dak. R. C. No. 13, issued August 15, 1916, effective as to intrastate traffic September 15, 1916; Local and Joint Block Tariff containing express rate tables from Block 425, So. Dak. R. C. No. 14, issued August 15, 1916, effective as to intrastate traffic September 15, 1916; Local and Joint Block Tariff containing express rate tables from block 426, So. Dak. R. C. No. 15, issued August 15, 1916, effective as to intrastate traffic September 15, 1916; Local and Joint Block Tariff containing express rate tables from Block 427, So. Dak. R. C. No. 16, issued August 15, 1916, effective as to intrastate traffic September 15, 1916; Local and Joint Block Tariff containing express rate tables from block 428, So. Dak. R. C. No. 17, issued August 15, 1916, effective as to intrastate traffic September 15, 1916; Local and Joint Block Tariff containing express rate tables from block 429, So. Dak. R. C. No. 18, issued August 15, 1916, effective as to intrastate traffic September 15, 1916; Local and Joint Block Tariff containing express rate tables from block 522, So. Dak. R. C. No. 19, issued August 15, 1916, effective as to intrastate traffic September 15, 1916; Local and Joint Block Tariff containing express rate tables from block 523, So. Dak. R. C. No. 20, issued August 15, 1916, effective as to intrastate traffic September 15, 1916; Local and Joint Block Tariff containing express rate tables from block 524, So. Dak. R. C. No. 21, issued August 15, 1916, effective as to intrastate traffic September 15, 1916; Local and Joint Block Tariff containing express rate tables from block 525, So. Dak. R. C. No. 22, issued August 15, 1916, effective as to intrastate traffic September 15, 1916; Local and Joint Block Tariff containing express rate tables from block 526, So. Dak. R. C. No. 23, issued August 15, 1916, effective as to intrastate traffic September 15, 1916; Local and Joint Block Tariff containing express rate tables from block 527, So. Dak. R. C. No. 24, issued August 15, 1916, effective as to intrastate traffic September 15, 1916;

Local and Joint Block Tariff containing express rate tables from block 528, So. Dak. R. C. No. 25, issued August 15, 1916, effective as to intrastate traffic September 15, 1916; Local and Joint Block Tariff containing express rate tables from block 529, So. Dak. R. C. No. 26, issued August 15, 1916, effective as to intrastate traffic September 15, 1916; Local and Joint Block Tariff containing express rate tables from block 621, So. Dak. R. C. No. 27, issued August 15, 1916, effective as to intrastate traffic September 15, 1916; Local and Joint Block Tariff containing express rate tables from block 622, So. Dak. R. C. No. 28, issued August 15, 1916, effective as to intrastate traffic September 15, 1916; Local and Joint Block Tariff containing express rate tables from block 623, So. Dak.
17 R. C. No. 29, issued August 15, 1916 effective as to intrastate traffic September 15, 1916; Local and Joint Block Tariff containing express rate tables from block 624, So. Dak. R. C. No. 30, issued August 15, 1916, effective as to intrastate traffic September 15, 1916; Local and Joint Block Tariff containing express rate tables from block 625, So. Dak. R. C. No. 31, issued August 15, 1916, effective as to intrastate traffic September 15, 1916; Local and Joint Block Tariff containing express rate tables from block 626, So. Dak. R. C. No. 32, issued August 15, 1916, effective as to intrastate traffic September 15, 1916; Local and Joint Block Tariff containing express rate tables from block 627, So. Dak. R. C. No. 23, issued August 15, 1916, effective as to intrastate traffic September 15, 1916; Local and Joint Block Tariff containing express rate tables from block 628, So. Dak. R. C. No. 34, issued August 15, 1916, effective as to intrastate traffic September 15, 1916; Local and Joint Block Tariff containing express rate tables from block 629, So. Dak. R. C. No. 35, issued August 15, 1916, effective as to intrastate traffic September 15, 1916; Local and Joint Block Tariff containing express rate tables from block 728, So. Dak. R. C. No. 36, issued August 15, 1916, effective as to intrastate traffic September 15, 1916; Local and Joint Block Tariff containing express rate tables from block 729, So. Dak. R. C. No. 37, issued August 15, 1916, effective as to intrastate traffic September 15, 1916, or any of said tariffs, tables, classifications, rules or regulations; and

It is further ordered, that in the meantime and pending the final determination of this order or until the court shall otherwise order and direct, the defendants and each of them and their agents, servants, employes, attorneys and representatives and all persons acting for or on behalf of the said express companies or either of them, be and they are and each of them is hereby enjoined and restrained from putting into effect or applying on intrastate express traffic between the cities aforesaid and other stations of the defendant express companies in the State of South Dakota, or between any express stations on the lines of the defendant express companies in the State of South Dakota, any of the tariffs, tables, classifications, rules or regulations hereinbefore mentioned and described or from demanding, charging, receiving, exacting or collecting or otherwise
18 making effective any of the rates, tariffs, charges, classifications, rules or regulations contained in the said tariffs, tables,

classifications, rules, and regulations or either of them that were presented to the Board of Railroad Commissioners of this state for filing as aforesaid; and,

It is further ordered, that service of this order and the affidavit attached be made upon the defendants on or before September, 16th, 1916, and that the defendants serve upon the attorneys for plaintiff their answer or counter-showing to this order and affidavit on or before September 26th, 1916.

Dated this 12th day of September, 1916.

By the Court:

SAMUEL C. POLLEY,
Presiding Judge.

Attest:
E. F. SWARTZ,
Clerk of Said Court.
By S. G. DE LAND, *Deputy.* [SEAL.]

19 In the Supreme Court of the State of South Dakota.

STATE OF SOUTH DAKOTA ex Rel. CLARENCE C. CALDWELL, as Attorney General, and John J. Murphy, P. W. Dougherty, and W. G. Smith, as and Constituting the Board of Railroad Commissioners of the State of South Dakota. Plaintiff-,

vs.

AMERICAN EXPRESS COMPANY and GEORGE TAYLOR, Individually and as President of the American Express Company, and Wells, Fargo & Company, a Corporation, Defendants.

Affidavit.

STATE OF SOUTH DAKOTA,
County of Hughes, ss:

P. W. Dougherty being first duly sworn, on his oath deposes and says that he is a duly and legally elected, qualified and acting railroad commissioner and a member of the Board of Railroad Commissioners of the State of South Dakota, and that he is one of the relators in the above entitled action; that as such railroad commissioner, and in the course of his performance of the duties of that office, he has had occasion to examine the scale or schedule of rates and fares that are now being and for the past four or five years have been demanded, charged, collected and received by the defendant express companies for the transportation of property by express between the state of South Dakota, and that he knows the rates and fares exacted by said express companies for the service aforesaid are upon the same scale and schedule and are the same rates and fares as those specified in an order regularly made and entered by the Board of Railroad Commissioners of the State of South Dakota on

the 2d day of May, 1911, and which were issued to become effective on the 15th day of May, 1911, and which actually went into
20 force and effect on the 21st day of September, 1911; that the said schedules or scale of rates promulgated and issued in the order made and entered by the board of railroad commissioners as aforesaid were issued and promulgated pursuant to and in conformity with the provisions of chapter 152 of the laws of 1911 of the state of South Dakota, and were and are a uniform schedule or schedules of reasonable maximum rates of charges for the transportation of express freight between stations within this state over the lines of railroad wholly within this state and did not and do not exceed seventy per cent of the lowest rates which were in force for the transportation of express freight over any lines of railway between stations within this state on the 1st day of January, 1909.

That the said order regularly made and entered as aforesaid containing a uniform scale or schedule of reasonable maximum express rates, has not been in any respect changed or modified since the same became effective on the 21st day of September, 1911, as aforesaid, and that the provisions of the said order and of the said schedule or schedules of express rates remain in force and effect and specify the only rates, fares and charges which are at the present time in effect or apply in any way on the intrastate transportation of express freight wholly within the state of South Dakota; and that after the 21st day of September, 1911, the defendant express companies and the other express companies doing an intrastate express business in this state, published, printed and kept for public inspection schedules showing the rates, fares and charges for the transportation of property and express which conformed in every respect to and were the same as the rates, fares and charges specified in the said order and entered by the board of railroad commissioners on the 2d day of May, 1911, and as specified in the schedule or schedules of reasonable maximum rates or charges for trans-
21 portation of express freight between stations within this state, contained in the said order, and that the said schedules of express rates so printed, published and kept for public inspection thereby became and have ever since remained and now are the established and lawful schedule or schedules of intrastate express rates on the lines of the defendant express companies in this state, under and in accordance with the provisions of section 10 of chapter 207 of the laws of 1911 and acts amendatory thereof.

That the defendant express companies on the 25th day of August, 1916, by and through their joint agent, F. C. Airy, presented to the board of railroad commissioners for filing in their offices certain tariffs, tables, classifications, rules and regulations proposing and containing rates, fares, charges, classifications, rules and regulations to be *one* effective on September 15, 1916, on intrastate transportation of property by express between the cities of Sioux Falls, Mitchell, Aberdeen, Watertown and Yankton within this state, and all other stations of the defendant express companies in the state of South Dakota, greater and higher than the rates, fares, charges and compensation prescribed in the order and the schedule or schedules of

reasonable maximum express rates promulgated by the board of railroad commissioners of this state on the 2d day of May, 1911, and that the said tariffs, tables, classifications, rules and regulations presented for filing as aforesaid, proposed to be made effective on the 15th day of September, 1916, would, if permitted to become effective, effect an increase and advance of approximately 68.1% in the rates, fares and charges and in the joint rates, fares and charges specified and provided in the said order and schedule or schedules made by the board of railroad commissioners of this state, and which have been regularly adopted, established and published and made effective on intrastate express traffic in this state by the defendant express companies pursuant to law as aforesaid.

22 That the defendant express companies did not give to the board of railroad commissioners, nor to the public, thirty days' notice of the time when they proposed to put the said tariffs, tables, classifications, rules and regulations providing for increases and advances in their established express rates and charges into effect by printing, posting or publishing the said schedules as provided by law; that as a matter of fact the said express companies proposed to make the said advances in their rates, fares and charges, and in their joint rates, fares and charges, effective on a date twenty-one days subsequent to the time when they presented the said tariffs, tables, classifications, rules and regulations for filing in the office of the board of railroad commissioners; that the board of railroad commissioners did not assent to nor approve nor allow the said proposed changes in rates, rules, regulations or practices to go into effect, and did in fact expressly refuse so to do, and did refuse to file the tariffs, tables, classifications, rules and regulations proposing advances and changes in the rates, fares and charges published and established by said express companies as aforesaid.

That in rejecting and refusing to file the tariffs, tables, classifications, rules and regulations proposing advances and changes in rates for intrastate transportation of express as aforesaid, the board of railroad commissioners in regular session on said 25th day of August, 1916, adopted a resolution containing a description of such tariffs, tables, classifications, rules and regulations and a statement of the reasons for the board's refusal to file the same or to permit the changes or advances in rates, fares and charges therein provided for to become effective, a copy of which resolution is hereunto attached, marked exhibit "1" and made a part of this affidavit to the same effect as if fully set out herein.

23 That notwithstanding the refusal of the board of railroad commissioners to allow the said tariffs, tables, classifications, rules and regulations or either of them to become effective, the defendant express companies, as affiant is informed and verily believes, still threaten and propose to make effective, and that they will put into effect on September 15, 1916, the said changes and advances in intrastate express rates, fares and charges between the cities of Sioux Falls, Mitchell, Aberdeen, Watertown and Yankton, South Dakota, and all other stations of the defendant express companies in this state, unless they are restrained from so doing by order of this court;

and that the proposed, threatened and probable action of said express companies in this respect is and will be, as affiant is informed and verily believes, in direct violation of section 10 of chapter 207 of the laws of 1911 of the state of South Dakota and acts amendatory thereof and supplementary thereto.

That the board of railroad commissioners of the state of South Dakota is at the present time engaged in an investigation into the rates, rules, regulations, practices and affairs of the express companies engaged in the express business in the state of South Dakota; that the purpose of said investigation is to collect facts, figures and information which will enable the board of railroad commissioners to determine what would be just, reasonable and proper rates, fares and charges, rules, regulations and practices applying to the intrastate transportation of property by express between points wholly within the state of South Dakota; that a hearing in connection with this investigation has been called to be held before the board of railroad commissioners at their offices in the Capitol in the city of Pierre, Hughes County, South Dakota, on the 4th day of December, 1916, and the defendant express companies and the other express companies operating in this state have been notified of the said hearing and of the purposes thereof; that until the conclusion
24 of said investigation the board of railroad commissioners of this state will not have sufficient information to enable it to determine what would be reasonable, just and proper rates, fares and charges for the intrastate transportation of express freight wholly within the state of South Dakota, and until that time the board cannot approve or allow the said proposed changes and advances in intrastate express rates, fares and charges to go into effect.

(Signed) P. W. DOUGHERTY.

Subscribed and sworn to before me this 11th day of September, 1916.

(Signed) H. A. USTRUD,
[SEAL.] *Notary Public, Hughes County, S. D.*

25 EXHIBIT "I."

At a Regular Session of the Board of Railroad Commissioners of the State of South Dakota, Held at its Offices in the City of Pierre, the Capital, on the 25th Day of August, 1916.

Present: Commissioners Dougherty and Murphy.

In the Matter of the Proposal of the Express Companies Doing Business in the State of South Dakota, to Advance Their Local and Joint Intrastate Rates, Fares and Charges for Transportation of Property by Express Between Aberdeen, South Dakota, Mitchell, South Dakota, Sioux Falls, South Dakota, Watertown, South Dakota, or Yankton, South Dakota, and all Stations of the American Express Company or the Wells Fargo & Company Express in the State of South Dakota.

Resolution.

Whereas, the American Express Company and the Wells-Fargo & Company Express by F. G. Airy, their agent, have on this 25th day of August, 1916, presented to the Board of Railroad Commissioners of the State of South Dakota, for the approval of and to be filed in the office of said board, certain classifications, tariffs, tables and schedules, proposing advances in local and joint intrastate rates, fares and charges for the transportation of property by express between Aberdeen, Mitchell, Sioux Falls, Watertown or Yankton, South Dakota, and all stations of the American Express Company or the Wells-Fargo & Company Express, within the State of South Dakota, which classifications, tariffs, tables and schedules are designated and described as follows, to-wit:

Official Express Classification No. 24, So. Dak. R. C. No. 8 issued August 15, 1916, effective September 15, 1916; Local and Joint Schedule of First and Second-Class Express Rates, No. 2, So. Dak. R. C. No. 9, issued August 15, 1916, effective September 15, 1916;

26 Joint Directory of Express Stations Showing Block number and subblock letters designating their locations, So. Dak. R. C. No. 10, issued August 15, 1916, effective September 15, 1916;

Joint Directory of Collection and Delivery Limits of Express Stations, So. Dak. R. C. No. 11, issued August 15, 1916, effective September 15, 1916; Local and Joint Block Tariff containing express rate tables from Block 423, So. Dak. R. C. No. 12, issued August 15, 1916, effective as to intrastate traffic September 15, 1916; Local and Joint Block Tariff containing express rate tables from Block 424, So. Dak. R. C. No. 13, issued August 15, 1916, effective as to intrastate traffic September 15, 1916; Local and Joint Block Tariff containing express rate tables from Block 425, So. Dak. R. C. No. 14, issued August 15, 1916, effective as to intrastate traffic September 15, 1916; Local and Joint Block Tariff containing express rate

tables from Block 426, So. Dak. R. C. No. 15, issued August 15, 1916, effective as to intrastate traffic September 15, 1916; Local and Joint Block Tariff containing express rate tables from Block 427, So. Dak. R. C. No. 16, issued August 15, 1916, effective as to intrastate traffic September 15, 1916; Local and Joint Block Tariff containing express rate tables from Block 428, So. Dak. R. C. No. 17, issued August 15, 1916, effective as to intrastate traffic September 15, 1916; Local and Joint Block Tariff containing express rate tables from Block 429, So. Dak. R. C. No. 18, issued August 15, 1916, effective as to intrastate traffic September 15, 1916; Local and Joint Block Tariff containing express tables from Block 522, So. Dak. R. C. No. 19, issued August 15, 1916, effective as to intrastate traffic September 15, 1916; Local and Joint Block Tariff containing express rate tables from Block 523, So. Dak. R. C. No. 20, issued August 15, 1916, effective as to intrastate traffic September 15, 1916; Local and Joint Block Tariff containing express rate tables from Block 524, So. Dak. R. C. No. 21, issued August 15, 1916, effective as to intrastate traffic September 15, 1916; Local and Joint Block Tariff containing express rate tables from Block 525, So. Dak. R. C. No. 22, issued August 15, 1916, effective as to intrastate traffic
27 September 15, 1916; Local and Joint Block Tariff containing express rate tables from Block 526, So. Dak. R. C. No. 23, issued August 15, 1916, effective as to intrastate traffic September 15, 1916; Local and Joint Tariff containing express rate tables from Block 527, So. Dak. R. C. No. 24, issued August 15, 1916, effective as to intrastate traffic September 15, 1916; Local and Joint Tariff containing express rate tables from Block 528, So. Dak. R. C. No. 25, issued August 15, 1916, effective as to intrastate traffic September 15, 1916; Local and Joint Tariff containing express rate tables from Block 529, So. Dak. R. C. No. 26, issued August 15, 1916, effective as to intrastate traffic September 15, 1916; Local and Joint Tariff containing express rate tables from Block 621, So. Dak. R. C. No. 27, issued August 15, 1916, effective as to intrastate traffic September 15, 1916; Local and Joint Tariff containing express rate tables from Block 622, So. Dak. R. C. No. 28, issued August 15, 1916, effective as to intrastate traffic September 15, 1916; Local and Joint Tariff containing express rate tables from Block 623, So. Dak. R. C. No. 29, issued August 15, 1916, effective as to intrastate traffic September 15, 1916; Local and Joint Tariff containing express rate tables from Block 624, So. Dak. R. C. No. 30, issued August 15, 1916, effective as to intrastate traffic September 15, 1916; Local and Joint Tariff containing express rate tables from Block 625, So. Dak. R. C. No. 31, issued August 15, 1916, effective as to intrastate traffic September 15, 1916; Local and Joint Tariff containing express rate tables from Block 626, So. Dak. R. C. No. 32, issued August 15, 1916, effective as to intrastate traffic September 15, 1916; Local and Joint Tariff containing express rate tables from Block 627, So. Dak. R. C. No. 33, issued August 15, 1916, effective as to intrastate traffic September 15, 1916; Local and Joint Tariff containing express rate tables from Block 628, So. Dak. R. C. No. 34, issued August 15, 1916, effective as to intrastate traffic September 15, 1916; Local and Joint Tariff

containing express rate tables from Block 629, So. Dak. R.
28 C. No. 35, issued August 15, 1916, effective as to intrastate traffic September 15, 1916; Local and Joint Tariff containing express rate tables from Block 728, So. Dak. R. C. No. 36, issued August 15, 1916, effective as to intrastate traffic September 15, 1916; Local and Joint Tariff containing express rate tables from Block 729, So. Dak. R. C. No. 37, issued August 15, 1916, effective as to intrastate traffic September 15, 1916.

And Whereas, the said Express Companies or any of them or their agent, F. G. Airy, or any person acting for them or on their behalf or on behalf of either of them have not applied to the Board of Railroad Commissioners of the State of South Dakota, for their assent to the filing of or for their approval of said classifications, tariffs, tables, schedules or any of them and the said Board of Railroad Commissioners has not and does not assent to the filing thereof, and has not and does not approve or allow the said classifications, tariffs, tables or schedules proposing advances in intrastate rates, fares and charges or any of them; and,

Whereas, the said classifications, tariffs, tables and schedules have not been printed and published, and thirty days notice of the time when the said proposed classifications, tariffs, tables and schedules shall go into effect has not been given to the Board of Railroad Commissioners of the State of South Dakota, and to the public, as required by the provisions of Section 10 of Chapter 207 of the Laws of 1911.

Therefore, Be it Resolved by the Board of Railroad Commissioners of the State of South Dakota, that the classifications, tariffs, tables and schedules proposing advances in local and joint intrastate express rates between certain points within the state of South Dakota, hereinbefore fully described and set forth be and they are hereby disapproved, disallowed and rejected, and that the
29 Secretary of this Board be and he is hereby directed to return all of the said classifications, tariffs, tables and schedules proposing advances in intrastate express rates as aforesaid to F. G. Airy, the agent of the express companies proposing the same together with a certified copy of this resolution.

Adopted by the Board:.

H. A. USTRUD, *Secretary.*

30 [Endorsed:] 4106. State ex Rel. Caldwell, et al., vs. American Express Co. et al. Copy. Summons & Complaint. Supreme Court, State of South Dakota. Filed Sep. 12, 1916. E. F. Swartz, Clerk.

31 In the Supreme Court of the State of South Dakota.

STATE OF SOUTH DAKOTA ex Rel. CLARENCE C. CALDWELL, as Attorney General, and John J. Murphy, P. W. Dougherty, and W. G. Smith, as and Constituting the Board of Railroad Commissioners of the State of South Dakota, Plaintiff-.

vs.

AMERICAN EXPRESS COMPANY and GEORGE C. TAYLOR, Individually and as President of the American Express Company, and The Wells, Fargo & Company, a Corporation, Defendants.

Motion.

Comes now the plaintiff, the State of South Dakota, on the relation of Clarence C. Caldwell, Attorney General, and John J. Murphy, P. W. Dougherty and W. G. Smith, as and constituting the Board of Railroad Commissioners of the State of South Dakota, and moves the court that it issue an order to show cause to the defendants in this action why they and each of them, and their agents, employes, representatives and all persons acting for or on behalf of them or either of them, should not be restrained and enjoined, pending the final determination of this action, from putting into effect or applying on the transportation of property by express between points and stations on the lines of the defendant express companies wholly within the state of South Dakota, intrastate, the tariffs, tables, classifications, rules and regulations, or any of the rates, tariffs, charges, classifications, rules or regulations therein contained, which were by F. G. Airey, the joint agent of the said defendant express companies, presented to the Board of Railroad Commissioners of the State of South Dakota for filing in their offices on the 25th day of August, 1916, and from demanding, charging, collecting or receiving, or in any manner exacting for the intrastate transportation of property by express between points and stations of the defendant express
32 companies wholly within the state of South Dakota, any rates, charges, fares or compensation whatever higher than or in excess of the rates, tariffs, charges and compensation specified and provided in the order and schedule or schedules of express rates applying on intrastate transportation of express between points within the state of South Dakota, issued by the Board of Railroad Commissioners of this state on the 2nd day of May, 1911, to become effective on the 15th day of May, 1911, and which actually went into effect on the 21st day of September, 1911, and were thereafter issued, promulgated, published and put into effect by the defendant express companies on their intrastate express business within this state, and have ever since remained and now are the rates, fares, charges and compensation actually being demanded, charged, received and exacted by the said defendant express companies for the intrastate transportation of property by express within this state. The said tariffs, tables, classifications, rules and regulations, and said order and

schedule or schedules of express rates, are more fully described in the complaint of the plaintiff and in the affidavit of P. W. Dougherty on file in this case, and to which reference is hereby made.

This motion is made and based upon the summons, complaint of the plaintiff, and the affidavit of P. W. Dougherty on file in this court.

Dated at Pierre, South Dakota, this 11th day of September, 1916.

CLARENCE C. CALDWELL,
Attorney General;
OLIVER E. SWEET,
Assistant Attorney General;
P. W. DOUGHERTY,
Attorneys for Plaintiff.

33 In the Supreme Court of the State of South Dakota.

STATE OF SOUTH DAKOTA ex Rel. CLARENCE C. CALDWELL, as Attorney General, and John J. Murphy, P. W. Dougherty, and W. G. Smith, as and Constituting the Board of Railroad Commissioners of the State of South Dakota, Plaintiffs,

vs.

AMERICAN EXPRESS COMPANY and GEORGE C. TAYLOR, Individually and as President of the American Express Company, and The Wells, Fargo & Company, a Corporation, Defendants.

Answer.

The defendants herein, answering the complaint herein, say:

First.

The defendants admit the allegations of the first paragraph of the complaint herein, excepting that they deny that Clarence C. Caldwell, as Attorney General, and John J. Murphy, P. W. Dougherty and W. G. Smith, as and constituting the Board of Railroad Commissioners of the state of South Dakota, bring this action by the authority of the statutes and laws of the state of South Dakota, or bring said action for and on behalf of all of the people of said state.

Second.

Defendants, answering, admit the allegations of the second paragraph of the complaint herein, excepting that they allege that as common carriers they are subject to the laws of the state of South Dakota only insofar as said laws do not conflict with the Constitution of the United States, and with the laws of the United States relating to Commerce among the several states.

34

Third.

Defendants admit the allegations of the third paragraph of the complaint, excepting that they allege that the schedule of express rates promulgated by the Board of Railroad Commissioners of the state of South Dakota has been modified or changed, as hereinafter set forth.

Fourth.

Defendants, further answering, admit the allegations of the fourth paragraph of the complaint herein, excepting that they deny that they have any knowledge or information sufficient to form a belief as to the "belief" or "presumption" indulged by the Board of Railroad Commissioners of the state of South Dakota in its action, set forth in said fourth paragraph of said complaint.

Fifth.

Defendants, further answering the allegations of the fifth paragraph of the complaint herein, admit that the Board of Railroad Commissioners of the state of South Dakota has called a hearing, to be held before said Board in the city of Pierre, South Dakota, on the 4th day of December, 1916, but deny that they have knowledge or information sufficient to form a belief as to the purpose for which the Board of Railroad Commissioners of the state of South Dakota called said hearing.

Sixth.

Defendants, further answering, admit the allegations of the sixth paragraph of the complaint herein, excepting that they deny that they have any knowledge or information sufficient to form a belief as to the reason why the Board of Railroad Commissioners of the state of South Dakota took the action set forth in said sixth paragraph of the complaint.

Seventh.

Defendants, further answering, admit that they are still proposing to put into effect the tariffs between the cities of Sioux Falls, Mitchell, Aberdeen, Watertown and Yankton and other
35 points in the state of South Dakota, the schedule of express rates tendered by them to the Board of Railroad Commissioners of the state of South Dakota for filing, as set forth in the sixth paragraph of the complaint, and deny each and every other allegation contained in the seventh paragraph of the complaint herein.

Eighth.

Defendants, further answering the eighth paragraph of the complaint herein, admit that the state of South Dakota is a shipper of

express matter between stations in the state of South Dakota and deny every other allegation in said eighth paragraph of the complaint contained.

Ninth.

Defendants, further answering, deny the allegations of the ninth paragraph of the complaint herein.

Tenth.

Defendants, further answering, and for a further and separate defense herein, allege that the schedule of express rates for intrastate business in the state of South Dakota adopted by the Board of Railroad Commissioners of the state of South Dakota on or about the 2nd day of May, 1911, as alleged in the third paragraph of the complaint herein, is a certain schedule known as "South Dakota Express Distance Tariff No. 2"; that a true, correct and complete copy of said South Dakota Express Distance Tariff No. 2 is hereunto annexed, marked Exhibit "A" and made a part hereof.

Eleventh.

Defendants, further answering, and for a further and separate defense herein, allege that on or about the 8th day of June, 1912, the Interstate Commerce Commission of the United States, in a certain proceeding entitled "In the Matter of Express Rates, Practices, Accounts and Revenues," the same being No. 4198 of cases before the Interstate Commerce Commission, and being the case reported in 24 Interstate Commerce Commission Reports, p. 380, the Interstate Commerce Commission adopted and promulgated certain schedules
36 of rates to be applied by the express companies throughout United States to the interstate transportation of express freight, which said rates the defendant express companies herein and all other express companies throughout the United States were required to put into effect on or before October 15, 1913, upon all interstate business, by an order of said Interstate Commerce Commission, made in said proceeding on or about the 24th day of July, 1913, as will appear from the report thereof in 28 Interstate Commerce Commission Reports p. 131; that the defendant express companies and all other express companies throughout the United States from and after the 15th day of October, 1913, adopted and put into force said rates, promulgated by the Interstate Commerce Commission upon all interstate traffic throughout the United States, and that said rates have ever since remained in full force and effect with respect to the interstate commerce throughout the United States, excepting as modified by the Interstate Commerce Commission in its decision in said proceeding, made on or about the 14th day of July, 1915, and reported in 35 Interstate Commerce Commission Reports, p. 3.

Twelfth.

Defendants, further answering, and for a further and separate defense herein, allege that in the year 1914, and while the tariffs promulgated by the Interstate Commerce Commission for interstate business throughout the United States were in full force and effect, a certain proceeding was instituted before the Interstate Commerce Commission by the Traffic Bureau of the Sioux City Commercial Club, of Sioux City, Iowa, against the American Express Company and Wells Fargo & Company, which said proceeding is No. 7101 upon the docket of the Interstate Commerce Commission; that the Traffic Bureau of the Sioux Falls Commercial Club, of Sioux Falls, South Dakota, the Mitchell Commercial Club, of Mitchell, South Dakota, the Aberdeen Commercial Club, of Aberdeen, South Dakota, the Chicago & Northwestern Railway Company the Adams Express Company and the relators herein, John J. Murphy, P. W. Dougherty and W. G. Smith intervened in said proceeding before the
37 Interstate Commerce Commission and became parties thereto; that the contention of complainant, the Traffic Bureau of the Sioux City Commercial Club, in said proceeding No. 7101, before the Interstate Commerce Commission, was, among other things, that the interstate express rates between the city of Sioux City and points in the state of South Dakota were unreasonably high as compared to the express rates between the cities of Sioux Falls, Aberdeen, Mitchell, Watertown and Yankton and other South Dakota points; that by reason thereof the jobbers, wholesalers and manufacturers of Sioux City were unjustly discriminated against and the jobbers and wholesalers of South Dakota were given an unjust and unreasonable advantage over the jobbers and wholesalers of the city of Sioux City in the matter of the transportation of their goods, wares and merchandise in the state of South Dakota; that in said proceeding No. 7101, before the Interstate Commerce Commission hearings were had and evidence introduced upon the part of the complainant, the defendants and the interveners respectively, including the relators herein, who were intervenors as aforesaid in said proceeding before the Interstate Commerce Commission; that said proceeding was duly argued upon behalf of the plaintiff, the defendants and the intervenors before the Interstate Commerce Commission, and that on or about the 23rd day of May, 1916, the Interstate Commerce Commission rendered a decision in said proceeding, by which said decision it was held that the rates for the interstate transportation of shipments by express between Sioux City, Iowa, and points in the state of South Dakota, prescribed by the Interstate Commerce Commission as reasonable, have not been shown to be unreasonable; that the defendant express companies maintained higher interstate rates between Sioux City and points in the state of South Dakota than between Sioux Falls, Mitchell, Aberdeen, Watertown and Yankton, South Dakota, and points in the same state applicable to shipments by express which are transported under substantially similar circumstances and conditions; that thereby an undue preference is given to Sioux Falls, Mitchell, Aberdeen, Watertown and Yankton, and

an undue and unreasonable prejudice and disadvantage is
38 effected against Sioux City and that the defendant express companies, to-wit: the American Express Company and Wells Fargo & Company, should desist and cease from continuing said undue preference and unjust discrimination; that a true, correct and complete copy of the decision of the Interstate Commerce Commission in said proceeding No. 7101, is hereunto annexed, marked Exhibit "B," and made a part hereof; that on or about the said 23rd day of May, 1916, the Interstate Commerce Commission, pursuant to said opinion, made an order in said proceeding No. 7101 requiring the defendants, Wells Fargo & Company and the American Express Company, to cease and desist, on or before August 15, 1916, and thereafter to abstain from publishing, demanding or collecting higher rates for the transportations of shipments by express between Sioux City, Iowa, and points in the state of South Dakota than cotemporaneously published, demanded or collected for the transportation of shipments by express under substantially similar circumstances and conditions, for substantially equal distances between Sioux Falls, Mitchell, Aberdeen, Watertown and Yankton, South Dakota, on the one hand, and other points in the state of South Dakota on the other, which said relation of rates has been found by the Commission to be unjustly discriminatory; that it was ordered by the Interstate Commerce Commission that said order should remain in force for a period of not less than two years from the date when it shall take effect; that a true, correct and complete copy of said order is hereunto annexed, marked Exhibit "C," and made a part hereof; that subsequently and on or about the 1st day of August, 1916, the Interstate Commerce Commission made a further order, whereby the time within which said order, Exhibit "C," was to become effective was extended to September 15, 1916.

Thirteenth.

Defendants, further answering, and for a further defense herein, allege that at the conference held upon the 27th day of July, 1916, as set forth in the four paragraph of the complaint herein,
39 the relators, John J. Murphy, P. W. Dougherty and W. G. Smith, as the Board of Railroad Commissioners of the state of South Dakota, made and entered upon the record of said Board a report, of the proceedings had at said conference; that a true, correct and complete copy of said record so made by said Board is hereunto annexed, marked Exhibit "D" and made a part hereof; that the recitals in said record, Exhibit "D," are incorrect in one particular, to-wit: In the statement made therein that a request was made by the defendant express companies, or any of the express companies transacting business in the state of South Dakota, to put into effect in the state of South Dakota the Interstate Commerce Commission rates for transportation of express freight to and from Sioux Falls, Aberdeen, Mitchell, Watertown and Yankton and other South Dakota points, and defendants allege the truth to be that the defendants herein, Wells Fargo & Company and the American Ex-

press Company, and the other express companies transacting business in South Dakota, at said conference notified the Board of Railroad Commissioners of the state of South Dakota that the said Wells Fargo & Company and American Express Company had been ordered by the Interstate Commerce Commission, by its order, Exhibit "C" hereto, to place in effect the Interstate Commerce Commission rates between Sioux Falls, Aberdeen, Watertown, Mitchell and Yankton and other South Dakota points, and that said American Express Company and Wells Fargo & Company intended and were about to place said Interstate Commerce Commission rates in effect between said points in the state of South Dakota, in order to comply with said order of the Interstate Commerce Commission Exhibit "C;" that the defendant express companies, and the other express companies of the state of South Dakota, did, at said conference, request the Board of Railroad Commissioners of the state of South Dakota to adopt the Interstate Commerce Commission rates for all express traffic between said points and throughout the state of South Dakota, and thereby place all of the rates in the state of South Dakota upon a parity with the rates ordered by the Interstate Commerce Commission to and from Sioux Falls, Aberdeen, Mitchell, Watertown and Yankton, and upon a parity with
40 the interstate rates in force throughout the United States and for intrastate business in more than forty of the states of the United States; that the said Board of Railroad Commissioners refused so to adopt the Interstate Commerce Commission rates for intrastate business, and made and entered upon its records an order, a copy of which is hereunto annexed, marked Exhibit "E" and made a part hereof.

Fourteenth.

Defendants, further answering, and for a further defense herein, allege that on or about the 15th day of August, 1916, the defendants, the American Express Company and Wells Fargo & Company, did publish and promulgate certain express rate tables applying to the carriage of express freight between various points in the state of South Dakota; that true, correct and complete copies of said tables of express rates are hereunto annexed, marked Exhibit "F," and made a part hereof; that by said tables of express rates, Exhibit "F," all rates for the carriage of express matter intrastate throughout the state of South Dakota were left the same as provided in the South Dakota Express Distance Tariff No. 2, Exhibit "A" hereto, excepting the rates to and from the cities of Sioux Falls, Aberdeen, Watertown, Mitchell and Yankton, and other South Dakota points; that to the business between said cities of Sioux Falls, Aberdeen, Mitchell, Watertown and Yankton and other South Dakota points there were applied the rates prescribed by the Interstate Commerce Commission, as hereinbefore set forth, for interstate traffic between points within and points without the state of South Dakota; that excepting for the application of the Interstate Commerce Commission rates to traffic to and from said cities of Sioux Falls, Aberdeen,

Mitchell, Watertown and Yankton, no changes were made in the express tariffs throughout the state of South Dakota, as the same had previously existed under the provisions of the South Dakota Distance Tariff No. 2, Exhibit "A" hereto; that copies of said tables of freight rates, Exhibit "F" hereto, were, on or about the 25th
41 day of August, 1916, tendered to the Board of Railroad Commissioners of the state of South Dakota for filing; that the said Board of Railroad Commissioners of the state of South Dakota refused to file the same, and upon the 25th day of August, 1916, spread upon their records a certain resolution, a copy whereof is hereunto annexed, marked Exhibit "G" and made a part hereof.

Fifteenth.

Defendants, further answering, and for a further defense herein, allege that on or about the 28th day of August, 1916, a bill was filed in the District Court of the United States, for the Northern District of the state of Iowa, and the Western Division thereof, by the Brown Drug Company and others against the United States of America, the Interstate Commerce Commission, the American Express Company, Wells Fargo & Company and others, the purpose of which said bill was to set aside and enjoin the enforcement of said order of the Interstate Commerce Commission, Exhibit "C" hereto; that a true, correct and complete copy of said bill is hereunto annexed, marked Exhibit "H," and made a part hereof; that attached to said bill, Exhibit "H," as exhibits were the opinion and order of the Interstate Commerce Commission, Exhibits "B" and "C" hereto; that upon the said 28th day of August, 1916, upon application of the plaintiffs in said suit of Brown Drug Company et al. vs. the United States et al. there was issued by the court an order to show cause why said order of the Interstate Commerce Commission, Exhibit "C," be not set aside or suspended during the pendency of said suit, and why the American Express Company and Wells Fargo & Company should not be enjoined and restrained from putting into effect the schedule of rates for the intrastate shipment of express from and out of the cities of Sioux Falls, Mitchell, Aberdeen, Watertown and Yankton, in the state of South Dakota, filed by said express companies in the office of the Railroad Commission of the state of South Dakota, and Exhibit "F" hereto; that said order to show cause was returnable upon the 7th day of September, 1916; that upon the return day of said order to show cause, the
42 same was heard before the Hon. Walter I. Smith, United States Circuit Judge, Martin J. Wade, United States District Judge, and Henry T. Reed, United States District Judge; that upon said hearing an order was entered denying a temporary injunction; that a true, correct and complete copy of said order is hereunto attached, marked Exhibit "J" and made a part hereof; that no appeal has been taken from said order, and that the same is in full force and effect; that the relator herein, P. W. Dougherty, and whose name appears as one of the attorneys for the plaintiffs herein, was present at the hearing upon said order to show cause, and was present

in court upon the 8th day of September, 1916, at the time the decision was announced by the court denying the motion of the plaintiffs in said suit for a temporary injunction.

Sixteenth.

Defendants, further answering, and for a further defense herein, allege that under and by virtue of Chapter 231 of the Acts of the Third Session of the Sixty-First Congress of the United States, entitled "An Act to Codify, Revise and Amend the Laws Relating to the Judiciary," approved March 3, 1911, and the same being pages 1087 to 1169, of Part I, of Volume 36 of the United States Statutes at Large, it was, among other things, enacted as follows, to-wit:

"Sec. 200. There shall be a court of the United States, to be known as the Commerce Court, which shall be a court of record, and shall have a seal of such form and style as the court may prescribe.

* * * * * * *

"Sec. 207. The Commerce Court shall have the jurisdiction possessed by circuit courts of the United States and the judges thereof immediately prior to June eighteenth, nineteen hundred and ten, over all cases of the following kinds.

* * * * * * *

"Second. Cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission.

* * * * * * *

"The jurisdiction of the Commerce Court over cases of the foregoing classes shall be exclusive; but this chapter shall not affect the jurisdiction possessed by any circuit or district court of the United States over cases or proceedings of a kind not within the above-enumerated classes.

* * * * * * *

"Sec. 208. Suits to enjoin, set aside, annul or suspend any order of the Interstate Commerce Commission shall be brought in
43 the Commerce Court against the United States. The pendency of such suit shall not of itself stay or suspend the operation of the order of the Interstate Commerce Commission; but the Commerce Court in its discretion, may restrain or suspend, in whole or in part, the operation of the commission's order pending the final hearing and determination of the suit. No order or injunction so restraining or suspending an order of the Interstate Commerce Commission shall be made by the Commerce Court otherwise than upon notice and after hearing, except that in cases where irreparable damage would otherwise ensue to the petitioner, said court, or a judge thereof may, on hearing, after not less than three days' notice to the Interstate Commerce Commission and the Attorney General, allow a temporary stay or suspension, in whole or in part of the operation of the order of the Interstate Commerce Commission for not more than sixty days from the date of the order of such court or judge, pending application to the court for its order or injunction, in which

case the said order shall contain a specific finding, based upon evidence submitted to the judge making the order and identified by reference thereto, that such irreparable damage would result to the petitioner and specifying the nature of the damage. The court may, at the time of hearing such application, upon a like finding, continue the temporary stay or suspension in whole or in part until its decision upon the application."

Seventeenth.

Defendants, further answering, and for a further defense herein allege that by the act of the First Session of the Sixth-Third Congress of the United States, known as Chapter 32 of the Laws of said session, and entitled "An Act Making Appropriations to Supply Urgent Deficiencies for the Fiscal Year Nineteen Hundred and Thirteen and for Other Purposes," approved October 22, 1913, the same
44 being pages 209 to 233 of Part I of Volume 38 of the United States Statutes at Large, it was, among other things, provided as follows, to-wit:

"The Commerce Court, created and established by the Act entitled 'An Act to create a Commerce Court and to amend the Act entitled 'An Act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, as heretofore amended, and for other purposes,' approved June eighteenth, nineteen hundred and ten, is abolished from and after December thirty-first, nineteen hundred and thirteen, and the jurisdiction vested in said Commerce Court by said Act is transferred to and vested in the several district courts of the United States, and all Acts or parts of Acts in so far as they relate to the establishment of the Commerce Court are repealed. * * *

"The venue of any suit hereafter brought to enforce, suspend or set aside, in whole or in part, any order of the Interstate Commerce Commission shall be in the judicial district wherein is the residence of the party or any of the parties upon whose petition the order was made, except that where the order does not relate to transportation or is not made upon the petition of any party the venue shall be in the district where the matter complained of in the petition before the commission arises, and except that where the order does not relate either to transportation or to a matter so complained of before the commission the matter covered by the order shall be deemed to arise in the district where one of the petitioners in court has either its principal office or its principal operating office. In case such transportation relates to a through shipment the term 'destination' shall be construed as meaning final destination of such shipment.

"The procedure in the district courts in respect to cases of which jurisdiction is conferred upon them by this Act shall be the same as that heretofore prevailing in the Commerce Court. The orders, writs and processes of the district courts may in these cases run, be served and be returnable anywhere in the United States; and the right of appeal from the district courts in such cases shall be the same as the right of appeal heretofore prevailing under existing law from the Commerce Court. No interlocutory injunction suspending or re-

straining the enforcement, operation or execution of, or setting aside, in whole or in part, any order made or entered by the Interstate Commerce Commission shall be issued or granted by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, unless the application for the same shall be presented to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a circuit judge, and unless a majority of said three judges shall concur in granting such application. When such application as aforesaid is presented to a judge, he shall immediately call to his assistance to hear and determine the application two other judges. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the Interstate Commerce Commission, to the Attorney General of the United States, and to such other persons as may be defendants in the suit; Provided, that in cases where irreparable damage would otherwise ensue to the petitioner, a majority of said three judges concurring, may, on hearing, after not less than three days' notice to the Interstate Commerce Commission and the Attorney General, allow a temporary stay or suspension, in whole or in part, of the operation of the order of the Interstate Commerce Commission for not more than sixty days from the date of the order of said judges pending the application for the order or injunction, in which case the said order shall contain a specific finding, based upon evidence submitted to the judges making the order and identified by reference thereto, that such irreparable damage would result to the petitioner and specifying the nature of the damage. The said judges may, at the time of hearing such application, upon
45 a like finding, continue the temporary stay or suspension in whole or in part until decision upon the application. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction, in such case if such appeal be taken within thirty days after the order, in respect to which complaint is made, is granted or refused; and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission, the same requirement as to judges and the same procedure as to expedition and appeal shall apply."

that by reason of the provisions aforesaid of the laws of the United States, this court possesses no jurisdiction to hear and determine the issues involved in this suit, and no jurisdiction to annul, suspend or enjoin the enforcement of the order of the Interstate Commerce Commission, Exhibit "C" hereto.

Wherefore defendants pray that the complaint herein be dismissed and that they have and recover their costs and disbursements herein.

BAILEY & VOORHEES,
Attorneys for Defendants.

STATE OF SOUTH DAKOTA,
County of Minnehaha, ss:

C. O. Bailey, being first duly sworn, deposes and says that he is one of the attorneys for the defendants in the above entitled action; that he has read the foregoing answer and knows the contents thereof; that the same is true, to affiant's best knowledge, information and belief; that the reason why this affidavit of verification is made by affiant and not by the defendants, or one of them, is that the defendant, Wells Fargo & Company, is a foreign corporation, and that the American Express Company is a joint stock association or partnership; that none of the officers of Wells Fargo & Company and none of the members or partners of the American Express Company, including George C. Taylor, the president thereof, reside or
at present are within the said county of Minnehaha, where
46 affiant resides.

C. D. BAILEY.

Subscribed and sworn to before me this 23rd day of September, 1916.

[SEAL.] E. DALLMAN,
Notary Public, Minnehaha County, South Dakota.

47 EXHIBIT A.

South Dakota Express Distance Tariff No. 2.

Cancels Tariff No. 1.

STATE OF SOUTH DAKOTA:

Express Distance Tariff No. 2.

Schedule of Maximum Rates of Charges for the Transportation of Property by Express Between Points within the State: Intrastate.

Applying to each express company doing business in South Dakota.

Governed by Official Express Classification No. 20, issued by F. G. Airy, Agent, and exceptions and supplements thereto, and reissues thereof.

This tariff not to apply to special rates in force for transportation of cream, milk, poultry and general specials if such rates are lower than the rates herein established, all such rates to continue in force until otherwise ordered by the Board of Railroad Commissioners. In all cases the lowest rate shall be applied.

No rate to exceed sum of locals by shortest route via common points.

Shipments carried over two or more lines of railroad operated by

one express company will be subject to the above rates figured on continuous mileage.

When rates for exact distance are not shown, the rates for the next greater distance as shown on tariff shall govern.

Issued by the Board of Railroad Commissioners of the State of South Dakota, May 2, 1911, effective May 15, 1911.

Merchandise Rates in Cents Per One Hundred Pounds.

Miles.	Rate.	Miles.	Rate	Miles.	Rate.	Miles.	Rate.	Miles.	Rate.
5	30	75	35	190	65	330	125	470	195
10	30	80	35	200	70	340	125	480	205
15	30	85	35	210	75	350	130	490	210
20	30	90	35	220	75	360	135	500	220
25	30	95	35	230	85	370	135	510	230
30	30	100	35	240	90	380	140	520	240
35	30	110	35	250	90	390	145	530	245
40	30	120	40	260	95	400	145	540	250
45	30	130	40	270	100	410	155	550	260
50	35	140	45	280	100	420	160	560	265
55	35	150	50	290	105	430	170	570	275
60	35	160	55	300	110	440	175	580	280
65	35	170	55	310	110	450	180	590	285
70	35	180	60	320	120	460	190	600	295
								650	300

48 That said tariff of rates of charges for the transportation of express freight between points within this state intrastate apply to each express company doing business in this state, and that such rates and the property transported thereunder be governed by the Official Express Classification No. 20, issued by F. G. Airy, Agent, and exceptions and supplements thereto and reissues thereof.

That the foregoing tariff shall not apply to special rates in force for the transportation of cream, milk, poultry or general specials unless the rates herein established are lower than the present rates in force for the transportation of such products, and all such rates for the transportation of such products shall continue in force until otherwise ordered by the Board of Railroad Commissioners of the state of South Dakota. In all cases the lowest rate shall be applied.

That no rate shall exceed the sum of the locals by the shortest route via common points.

That shipments of express carried over two or more lines of railroad operated by one express company shall be subject to the rates fixed by the foregoing tariff figured on a continuous mileage.

That when the rates for the exact distance are not shown, the rates for the next greater distance as shown on the foregoing tariff shall govern.

That said schedule or tariff of express rates be known as "South

Dakota Express Distance Tariff No. 2;" that it be issued as of May 2d, 1911, and become effective May 15th, 1911.

That the rates named in the said South Dakota Express Distance Tariff No. 2 are merchandise rates expressed in cents per one hundred pounds.

That the foregoing schedule or tariff of rates, viz: South Dakota Express Distance Tariff No. 2, be and hereby is adopted as a schedule of reasonable, uniform, maximum rates of charges for the transportation of property by express freight between points within
49 this state over lines of railway wholly within this state intrastate.

That South Dakota Express Distance Tariff No. 1 be and the same hereby is cancelled, effective May 15, 1911."

50 "EXHIBIT B."

Interstate Commerce Commission.

No. 7101.

TRAFFIC BUREAU OF THE SIOUX CITY COMMERCIAL CLUB

v.

AMERICAN EXPRESS COMPANY et al.

Submitted November 20, 1915. Decided May 23, 1916.

1. Rates for transportation by express between Sioux City, Iowa, and points in the state of South Dakota not shown to be unreasonable.

2. The present relation of rates for transportation by express between Sioux City, Iowa, and points in the state of South Dakota, and between the same South Dakota points and Sioux Falls, Mitchell, Aberdeen Watertown and Yankton, S. Dak., gives an undue preference to Sioux Falls, Mitchell, Aberdeen, Watertown, and Yankton and results in undue and unreasonable prejudice and disadvantage to Sioux City. Defendants ordered to remove this unjust discrimination.

C. E. Childe for complainant.

T. B. Harrison and C. O. Bailey for American Express Company, defendant, and Adams Express Company, intervener.

Branch P. Kerfoot and C. O. Bailey for Wells Fargo & Company, defendant.

P. W. Dougherty for the state of South Dakota, intervener.

Oliver E. Sweet, P. W. Dougherty, and D. L. Kelley for J. J. Murphy, W. G. Smith, and P. W. Dougherty, constituting the Board of Railroad Commissioners of the State of South Dakota, intervener.

R. D. Springer for Sioux Falls Commercial Club of Sioux Falls, S. Dak., intervener.

T. J. Morgans for Mitchell Commercial Club of Mitchell, S. Dak., intervener.

A. J. Branscom for Aberdeen Commercial Club of Aberdeen, S. Dak., intervener.

Report of the Commission.

MEYER, *Chairman:*

The complaint in this proceeding attacks as unreasonable and unduly and unreasonably prejudicial and disadvantageous to Sioux City the rates for transportation by express between Sioux City, Iowa, and points in the state of South Dakota. The allegations of undue prejudice and disadvantage are predicated upon comparisons with express rates applicable between Sioux Falls, S. Dak., and other South Dakota cities, on the one hand, and points in that state on the other. Complainant asks that an order be entered requiring the defendants to publish and maintain express rates applicable between Sioux City and South Dakota points which are no higher than those contemporaneously maintained for substantially the same distances between South Dakota cities such as Sioux Falls and other points in that state.

The parties defendant are the American Express Company, which operates between Sioux City and points in South Dakota over the lines of the Chicago & North Western Railway Company and of the Chicago, St. Paul, Minneapolis & Omaha Railway Company, and Wells Fargo & Company, which operates between Sioux City and South Dakota points over the Chicago, Milwaukee & St. Paul Railway Company, hereinafter referred to as the Milwaukee.

51 By their answers these defendants deny that their interstate express rates here attacked are unreasonable per se, but admit that unjust discrimination is caused by the present relation of express rates between Sioux City and South Dakota points, on the one hand and between points wholly within the state of South Dakota, on the other. For this unjust discrimination they disclaim responsibility, averring that the South Dakota intrastate express rates in their inception were published and are now maintained under the requirements of an order of the Board of Railroad Commissioners of South Dakota. The defendants further allege that these intrastate express rates yield less revenue than the cost of the service rendered and therefore place an unjust burden upon interstate express traffic; that they give an unreasonable and undue preference and advantage to South Dakota shippers and cause a corresponding prejudice and disadvantage to interstate shippers on shipments generally from and to points in that state to and from points in Iowa and other states. They ask that an order be entered requiring the removal of this unjust discrimination by applying to express shipments moving between all points in South Dakota the rates found reasonable by this Commission in In re Express Rates, Practices,

Accounts, and Revenues, 24 I. C. C., 381; 28 I. C. C., 131; 35 I. C. C., 3, hereinafter referred to as the Express Investigation. Thus the defendants seek to broaden the issues and bring before us for review the relation of rates on other movements than those involved in the complaint.

Interventions.

The Adams Express Company, the Chicago & North Western Railway Company, commercial clubs of Sioux Falls, Mitchell, and Aberdeen, S. Dak., hereinafter referred to as the South Dakota cities, the state of south Dakota, and the Board of Railroad Commissioners of the State of South Dakota, hereinafter referred to as the state commission, are parties by intervention. The Adams Express Company is engaged in transportation by express between points wholly within the state of South Dakota and also between points located in that state and in adjacent states. While this company serves Sioux City, it reaches only a few stations on the line of the Chicago, Burlington & Quincy Railroad Company, hereinafter referred to as the Burlington, in the extreme southwestern section of South Dakota. Its position with reference to the issues is in substance the same as that of the defendants. The Chicago & North Western Railway Company filed several exhibits consisting chiefly of comparisons between the South Dakota intrastate express rates and freight rates for the same movements, supplemented by similar comparisons for movements in other states. The South Dakota cities and the state commission oppose the contentions of complainant and defendants, although upon somewhat different theories.

Rate History.

Prior to September, 1911, the express rates applicable to South Dakota intrastate traffic were not uniform. In general the level of these rates was substantially the same as applied between Sioux City and South Dakota points, although in some instances they were higher than the interstate express rates for equal distances. On September 1, 1911, the present South Dakota intrastate express rates became effective. The circumstances leading to their adoption are the subject of a statement at length in the brief of the state commission, which is quoted in part in the footnote[1]. The express class rates applicable between Sioux City and South Dakota points are those prescribed by the Commission in Express Investigation, supra, effective February 1, 1914, as increased following our order on rehearing in the same case, 35 I. C. C., 3. Reference is made to our original report in that case for a statement of the investigation
52 made by the Commission and the considerations leading to the establishment of the interstate express schedules.

Location of Sioux City with Reference to South Dakota Traffic.

The city limits of Sioux City extend to the Big Sioux River at the southeastern corner of South Dakota, that river forming part of the

boundary line between South Dakota and Iowa. The southeastern section of South Dakota is thus a natural and important trade territory for Sioux City shippers whose principal competitors within the state are located at Sioux Falls, Mitchell, Aberdeen and Watertown. Competition with dealers located at Yankton in the sale of ice cream is also shown.

Rate Comparisons.

Complainant has compared the first-class express rates from Sioux City and Sioux Falls to all stations in South Dakota served by the defendant companies. In the following table are stated certain of these comparisons to points of representative distance from Sioux City. The columns of this table show the distances, first-class express rates, and first-class freight rates from Sioux City, the South Dakota intrastate first-class express rates for distances equal to those from Sioux City, together with the distances, first-class express rates, and first-class freight rates from Sioux Falls to the same stations. Rates are stated throughout this report, unless otherwise specified, in cents per 100 pounds:

	From Sioux City.			South Dakota	From Sioux Falls.		
To—	Miles.	First-class express rates.	First-class freight rates.	first-class express rates.	Miles.	First-class express rates.	First-class freight rates.
Jefferson	12.3	70	16	30	79	35	22.5
Elk Point	20.7	70	17	30	70.6	35	21.7
Burbank	29.3	70	22.5	30	79.2	35	33.3
Meckling	43.4	90	27	30	93.3	35	36
Alcester	49.4	90	28	35	107	35	38.7
Beresford	58.2	90	30	35	98.2	35	36.9
Hooker	74.8	90	33	35	81.6	35	30.6
Avon	99.8	140	38.5	35	110.9	40	40.5
Armour	122.8	140	44	40	120.8	40	42.3
Platte	149.7	140	47.5	50	160.8	55	49.5
Pukwana	195.2	160	56	70	158.5	55	47.7
Ashton	232.7	180	63.5	90	168.1	55	49.5
Aberdeen	265.3	200	66	100	182.3	65	53.1
Pierre	303.6	200	70	110	222.4	85	60.3
Interior	350.9	200	110	135	314.2	120	102.
Wall	402.8	245	112	155	335.6	125	108.5
Black Hawk ...	454.2	260	122	190	400	145	122
Terry	501.5	260	129	230	448.2	175	129

[1] For distances in South Dakota equal to those shown from Sioux City.

From this table it appears that the distances to Armour from Sioux City, 122.8 miles, and from Sioux Falls, 120.8 miles, are substantially the same. The first-class express rate from Sioux City is $1.40; from Sioux Falls, 40 cents; while the first-class freight rate from Sioux City is 44 cents and from Sioux Falls is 42.3 cents. Here is to be observed one of the incidents of the South Dakota express rates
53 to which attention is frequently directed in the evidence of complainant and defendants—that in many instances they are lower than the first-class freight rates for the same dis-

tances. The exhibit from which the foregoing table was taken sets forth rates to 288 stations, to 67 of which the first-class express rates from Sioux Falls are lower than the first-class freight rates. In some instances they are appreciably lower. To the larger number of stations the first-class express rates are higher, although in numerous instances the margin of difference is small.

Defendants have compared the South Dakota first-class express rates with a mileage scale of first-class freight rates in effect in that state on the line of the Burlington. From this comparison it appears that the first-class freight rates are lower than the first-class express rates for distances of 50 miles or less, but are substantially higher for distances of 55 miles or more. Emphasizing the fact that these comparisons embrace only the first-class freight rates, the state commission makes a similar comparison which includes freight rates for the first four classes, effective in South Dakota on the line of the Milwaukee. This comparison is shown in the following table:

Miles.	South Dakota first-class express rates.	Freight rates.			
		First class.	Second class.	Third class.	Fourth class.
10	30	13.5	11.7	9.4	7.2
20	30	18.0	15.3	12.1	9.0
30	30	22.5	18.9	14.8	11.2
40	30	26.1	21.6	17.5	13.0
50	35	27.9	23.4	18.4	13.9
60	35	29.7	25.2	19.3	14.8
70	35	31.5	26.1	20.7	15.7
80	35	33.3	27.9	22.3	16.6
90	35	35.1	29.7	22.5	17.5
100	35	36.9	30.6	24.3	18.4
120	40	40.5	34.2	26.5	20.2
140	45	44.1	36.9	29.7	22.0
160	55	47.7	39.6	32.4	23.8
180	60	51.3	43.2	34.2	25.6
200	70	54.9	45.9	36.9	27.4
220	75	57.6	48.6	38.7	28.8
240	90	60.3	50.4	40.5	30.1
260	95	63.0	53.1	42.3	31.5
280	100	65.7	54.9	44.1	32.8
300	110	68.4	57.6	45.9	34.2
320	120	71.1	59.4	47.7	35.5
340	125	73.8	62.1	49.5	36.9
360	135	76.5	63.9	51.3	38.2
380	140	79.2	66.6	53.1	39.6
400	145	81.9	68.4	54.9	40.9
Total	1,735	1,210.5	1,015.2	809.0	604.8

The aggregate express rates here shown are 143.3 per cent of the aggregate first-class freight rates, 170.9 per cent of the aggregate second-class freight rates, 214.4 per cent of the aggregate third-class freight rates, 286.8 per cent of the aggregate fourth-class freight rates. The amounts of these percentages are ob-
54 viously increased by the inclusion of comparisons for the longer distances. For distances 30 to 80 miles the first-class express rates exceed the first-class freight rates by less than 10 cents. The difference for most mileage groups within that range is materially less, while for distances 90 to 120 miles the express rates are lower than the first-class freight rates. It was testified by the rate expert of the state commission that a fair average express haul in this general territory would be approximately 100 miles. The average distance of intrastate shipments carried by the American Express Company for the five months, October, 1911-February, 1912, was 72.2 miles.

While acknowledging that some express rates from Sioux City to South Dakota points are higher than the intrastate rates for equal distances, the state commission asserts that some intrastate express rates are higher than the corresponding interstate rates. The inference drawn from this is that for such rate differences as exist the state schedules are not wholly responsible. Evidence in support of this position deals with (1) interstate and intrastate charges on packages weighing from 4 to 30 pounds for distances 20 to 150 miles; (2) comparisons of the interstate and intrastate scales of graduated charges as shown in charges for packages weighing less than 100 pounds. This evidence will be briefly reviewed.

The state commission questions the fairness of complainant's comparisons of interstate and intrastate rates applicable to the transportation of 100-pound weights. It points to defendants' evidence which shows that the average weight per transaction on all South Dakota intrastate express shipments carried by the Adams Express Company for the months of October, November, and December, 1911, and by Wells Fargo & Company in April, 1914, taken together, was 97.9 pounds; that the average weight of all interstate express shipments delivered to and carried from South Dakota points by Wells Fargo & Company in October 1913, was 59.3 pounds and in April, 1914, 26.7 pounds, the average weight per transaction being 34.9 pounds. It shows by its own evidence that the average weight per transaction of all express shipments carried by the American Express Company from Sioux City to South Dakota during the months of July and August in 1911, 1912, 1913, and 1914 was 44 pounds; that the average weight of merchandise shipments by express from Sioux City to South Dakota points for the months of July and August, 1914, was 25.5 pounds.

Related to these figures is an exhibit prepared by the state commission which compares interstate and intrastate charges for packages weighing from 4 to 30 pounds. These are shown for representative distances in the following table, which compares first-class express charges from Sioux City to certain points in South Dakota, effective February 1, 1914, with those prevailing for the

same weights and distances under the South Dakota scale. To this we have also added, as a matter of further information, the charges from Sioux City, effective prior to February 1, 1914, and those which became effective September 1, 1915:

From Sioux City to—	Charges on— 4 pounds.	6 pounds.	8 pounds.	12 pounds.	16 pounds.	20 pounds.	24 pounds.	30 pounds.
Elk Point (20.7 miles):								
Effective prior to Feb. 1, 1914	25	30	30	30	30	30	35	40
Effective Feb. 1, 1914	22	23	24	26	28	30	32	35
Effective Sept. 1, 1915	27	28	29	30	32	34	36	38
Under South Dakota scale	25	30	30	30	30	30	30	30
55								
Vermillion (35 miles):								
Effective prior to February 1, 1914	25	30	30	30	30	30	35	40
Effective Feb. 1, 1914	23	24	26	28	31	34	37	41
Effective Sept. 1, 1915	28	29	30	33	35	38	41	44
Under South Dakota scale	25	30	30	30	30	30	30	30
Gayville (50 miles):								
Effective prior to Feb. 1, 1914	30	35	35	35	35	35	40	45
Effective Feb. 1, 1914	23	24	26	28	31	34	37	41
Effective Sept. 1, 1915	28	29	30	33	35	38	41	44
Under South Dakota scale	25	30	30	30	30	30	35	35

From Sioux City to—	Charges on— 4 pounds.	6 pounds.	8 pounds.	12 pounds.	16 pounds.	20 pounds.	24 pounds.	30 pounds.
Yankton (61.2 miles):								
Effective prior to Feb. 1, 1914	30	35	40	40	40	40	45	50
Effective Feb. 1, 1914	23	24	26	28	31	34	37	41
Effective Sept. 1, 1915	28	29	30	33	35	38	41	44
Under South Dakota scale	25	30	30	30	30	30	35	35
Centerville (71 miles):								
Effective prior to Feb. 1, 1914	35	40	45	45	50	50	55	60
Effective Feb. 1, 1914	23	24	26	28	31	34	37	41
Effective Sept. 1, 1915	28	29	30	33	35	38	41	44
Under South Dakota scale	25	30	30	30	30	30	35	35
Scotland (89 miles):								
Effective prior to Feb. 1, 1914	35	40	45	45	50	50	55	60
Effective Feb. 1, 1914	24	26	28	31	35	39	43	48
Effective Sept. 1, 1915	29	30	32	36	39	43	47	52
Under South Dakota scale	25	30	30	30	30	30	35	35

Springfield (101 miles):

Effective prior to Feb. 1, 1914	35	40	45	45	50	50	55	60
Effective Feb. 1, 1914	24	26	28	31	35	39	43	48
Effective Sept. 1, 1915	29	30	32	36	39	43	47	52
Under South Dakota scale	25	30	30	30	30	30	35	35

Platte (150 miles):

Effective prior to Feb. 1, 1914	35	45	50	55	60	60	65	70
Effective Feb. 1, 1914	25	27	30	34	39	44	49	56
Effective Sept. 1, 1915	30	32	34	39	43	48	53	59
Under South Dakota scale	25	30	30	30	30	30	35	40

From this data it appears that, although the interstate charges from Sioux City were in some instances less than the South Dakota charges for equal distances prior to September 1, 1915, these differences have been largely removed by the increases in interstate charges which became effective on that date.

It is also urged by the state commission that a comparison of the intrastate scale of graduated charges with interstate charges for packages of equal weight will show many charges from Sioux City which are lower than those which apply between points in South Dakota. The charges under the intrastate and interstate schedules for packages weighing less than 100 pounds have been shown. For that purpose intrastate and interstate rates of 50 cents, 60 cents, 75 cents, 90 cents, $1, $1.25, $1.50, $1.75, $2.25, and $2.75 for
56 transportation of 100-pound packages are used in the state commission's exhibit.

It appears, however, that the lowest first-class express rate for 100-pound packages in effect between Sioux City and points in South Dakota is 70 cents. The other published interstate first-class express rates per 100 pounds applicable in that territory are 90 cents, $1.15, $1.40, $1.60, $1.80, $2, $2.25, $2.45, $2.60, and $2.80. We therefore show in the following table the state commission's comparisons with reference only to the first-class rates of 90 cents and $2.25. The interstate graduated charges as offered in evidence are those which became effective on February 1, 1914. To these have been added the interstate charges effective September 1, 1915:

57

Pounds.	Interstate first-class express charges Sioux City to South Dakota points under first-class rate of 90 cents per 100 pounds effective— Feb. 1, 1914.	Sept. 1, 1915.	Graduated charges under South Dakota Intrastate scale.	Interstate first-class express charges Sioux City to South Dakota points under first-class rate of $2.25 per 100 pounds effective— Feb. 1, 1914.	Sept 1, 1915.	Graduated charges under South Dakota Intrastate scale.
1.....	21	26	25	23	27	25
5.....	23	28	40	30	35	60
10.....	27	31	45	40	45	75
15.....	30	35	45	51	55	85
20.....	34	38	50	61	65	100
30.....	41	44	60	81	85	113
40.....	48	51	70	102	105	113
50.....	55	57	75	122	125	113
60.....	62	64	85	143	145	135
70.....	69	70	90	163	165	157
80.....	76	77	90	184	185	180
90.....	83	83	90	204	205	202
100.....	90	90	90	225	225	225

This form of comparison the defendants criticize as misleading in that it contrasts the scales of graduated charges under the same 100-pound rates and leaves out of consideration the important factor of distance. They urge, in substance, that inasmuch as the same rate under the two rate structures will carry 100 pounds different distances, it would be more accurate to compare the graduated charges under rates which will carry 100 pounds the same distances. There is apparently some confusion of thought with reference to the proper basis for comparing the graduated charges under the express rate structures here considered. There are three basic factors—the weight of the package, the distance from shipping point to destination, and the rate or charge for carrying the given weight the given distance. The weight taken as a standard for fixing rates is 100 pounds. Assuming for illustration that the distance is 122 miles, which is approximately the distance from both Sioux City and Sioux Falls to Armour, the charge paid by the interstate shipper for the transportation of 100 pounds by express is $1.40, by the state shipper, 40 cents. Suppose each shipper desires to ship by express to the same destination packages weighing less than 100 pounds. On such packages the following charges, in cents, would apply, the first stated in each instance from Sioux City, the second from Sioux Falls: 1 pound, 26, 25; 5 pounds, 31, 25; 10 pounds, 36, 30; 20 pounds, 48, 30; 30 pounds, 59, 35; 40 pounds, 71, 40; 50 pounds, 82, 40; 60 pounds, 94, 40; 70 pounds, 105, 40; 80 pounds, 117, 40; 90 pounds, 128, 40. Thus for the transportation of 100 pounds the Sioux City shipper's charges are 350 per cent of the Sioux Falls shipper's; for 80 pounds, 292 per cent; for 60 pounds, 235 per cent; for 40 pounds, 177 per cent; for 20 pounds, 160 per cent; for 5 pounds, 124 per cent.

The substance of the matter is that the South Dakota scale of graduated charges lays a proportionately greater charge upon the

lighter weights and correspondingly less upon the heavier. The real significance of the state commission's rate comparisons lies in their explanation of this fact. The relation of charges on lighter and heavier weights for the same distances was discussed in Express Investigation, supra, p. 427. We found that by their scales of graduated charges the express companies had placed an unwarranted burden upon shipments of light packages, and our revision of those scales in the new rates prescribed was intended to
58 correct these inequalities. The present South Dakota scale of graduated charges is the same as that condemned by this Commission in its application to interstate transportation.

It has been clearly shown that in the matter of charges for transportation by express, shipments from Sioux City to points in South Dakota bear a materially heavier burden than shipments of like character for the same distances between points in that state. But notwithstanding the substantial differences between the interstate and intrastate express rates, the state commission earnestly contends that unjust discrimination has not been shown. We shall briefly review other evidence which relates to this issue.

Contentions as to the Issue of Unjust Discrimination.

Complainant's witnesses testified in behalf of shippers of ice cream, fruit, vegetables, produce, and drugs. These are the lines of business chiefly affected by the relation of express rates, but it was stated that complaint of this adjustment has been made to complainant by packers, department stores, grocers, brewers, and shippers of seeds, nursery products, auto supplies, and hardware. The testimony shows that shippers by express from Sioux City are in active competition with shippers located at Sioux Falls and other points in South Dakota, such as Mitchell, Aberdeen, Watertown, and Yankton. Witnesses testified that since the intrastate rates became effective in 1911, the business of Sioux City shippers in South Dakota has decreased; that this fact is traceable to the relatively unequal adjustment of express rates; that they are compelled at times to equalize express charges or reduce prices in order to retain customers; that the rate inequalities have resulted in shipments from Sioux City by the less satisfactory freight service of articles which otherwise would be forwarded by express; that in many instances shipments from Sioux City by freight must compete with express service open to South Dakota shippers at the same or relatively equal rates. These are the chief disadvantages referred to by complainant's witnesses as caused by the adjustment here in issue.

Complainant's evidence along these lines was offered at the first hearing of this case. The state commissioner asked for a further hearing, which was granted, and in the intervening time subjected complainant's evidence to a searching analysis. A check of shipments from Sioux City to South Dakota points during the months of July and August, 1911, 1912, 1913, and 1914, was made at the Sioux City offices of Wells Fargo & Company and of the American Express Company. In addition to the evidence thus derived the

state commission offered considerable testimony intended to controvert the claim that Sioux City shippers are prejudiced by the relation of express rates here under consideration. Stated in brief form, the contentions of the state commission upon this issue are these: (1) That shipments from Sioux City to South Dakota by express have not decreased but have in fact increased since 1911; (2) that if the South Dakota trade of Sioux City in such commodities as commonly move by express has not grown to the satisfaction of her shippers, the true explanation is to be found, not in the relation of express rates, but in the increase of certain interstate express rates from Sioux City, effective February 1, 1914, and more especially in the development which has attended South Dakota industries.

The state commission offers the results of the check of express records at Sioux City to show that the figures given by some of complainant's witnesses are not in all respects accurate. An instance of this is in relation to shipments of ice cream. One witness, testifying in October, 1914, with reference to the interstate rates which became effective in September, 1911, and to the business of his company in South Dakota, said:

59 Before the rates went in we sold between twenty and twenty-five thousand gallons of ice cream. Last year we sold less than five.

The check of Wells Fargo & Company's books, recorded in pounds and reduced to gallons at 20 pounds to the gallon, showed that his company shipped via that carrier to South Dakota in July and August, 1911, 915.4 gallons; in the same months of 1912, 1,464.2 gallons; of 1913, 1,772.6 gallons; of 1914, 1,248.1 gallons. Based on these figures the state commission estimates the annual shipments of this company to South Dakota points via Wells Fargo & Company for the four years mentioned as 5,492.7, 8,785.2, 10,635.9, and 7,488.9 gallons, respectively.

It was found that the waybills of the American Express Company did not separate consignors, but the total shipments of ice cream from Sioux City to South Dakota points by all producers via lines of both express companies for the months of July and August in each of the same years were ascertained. These, stated in gallons, were 2,803.8, 3,299.6, 4,403.2, and 3,736.4 respectively. Alcester and Beresford were named by the same witness as stations at which his company has current accounts and his testimony, in effect, was that these accounts are smaller now than they formerly were. The check of express records shows that to these stations the total express shipments by all producers of ice cream, from Sioux City, were in 1911, 9,890 pounds; in 1912, 13,420 pounds; in 1913, 15,930 pounds; in 1914, 19,880 pounds. From this showing the state commission urges that other Sioux City shippers are more active than the company in behalf of which the testimony was offered. At the second hearing complainant's witness explained the apparent discrepancies between his testimony and the check made of express records by stating that he did not at any time refer to the year 1911, and that in the amount of business done 1911 was not representative of the years

which preceded or followed the establishment of the South Dakota rates. He testified without contradiction that up to that year his company had 170 customers located at about 80 points in South Dakota, while in September, 1915, its books showed 9 customers at 9 stations. Evidence as to decrease of business to South Dakota in the case of another shipper was found to be substantiated by the records of the express companies. This related to shipments of fruits and vegetables, of which those records showed an increase, however, in shipments by all dealers from Sioux City. A decrease in interstate shipments of drugs is ascribed by complainant's evidence to the relation of interstate and intrastate express rates.

As further evidence that Sioux City business has not been injuriously affected by the relation of interstate and intrastate express rates, the state commission has submitted certain other data obtained by its check of records of the American Express Company and Wells Fargo & Company at Sioux City. This is reproduced in part in the following table in which are shown for the months of July and August in the years 1911, 1912, 1913, and 1914, the number of transactions, number of pieces, average weight per transaction, average weight per piece, average charge per transaction and per piece, on all shipments of merchandise, ice cream, printed matter, fruits and vegetables, bread, eggs, butter, and poultry, and packing-house products from Sioux City to South Dakota points.

60

	Transaction.	Pieces.	Average weight per transaction.	Average weight per piece.	Charges per—	
					Transaction.	Piece.
Merchandise:			*Pounds.*	*Pounds.*	*Cents.*	*Cents.*
1911.....	6,869	7,895	16.29	14.17	49	43
1912.....	9,181	10,588	18.42	15.97	53	46
1913.....	7,036	8,138	24.19	20.92	57	49
1914.....	7,648	9,390	25.56	20.81	48	39
Ice cream:						
1911.....	425	571	131.94	98.19	104	77
1912.....	493	677	133.88	97.50	97	71
1913.....	613	872	143.69	101.00	103	72
1914.....	540	757	138.38	98.69	91	65
Printed matter:						
1911.....	1,087	1,226	47.56	42.17	70	62
1912.....	1,078	1,189	44.33	40.19	61	56
1913.....	1,046	1,130	44.48	41.17	62	57
1914.....	828	895	45.22	41.83	67	62
Fruit and vegetables:						
1911.....	1,119	5,147	140.11	30.46	98	21
1912.....	1,085	5,977	174.78	31.73	112	20
1913.....	1,786	6,457	112.95	31.24	79	22
1914.....	1,468	6,050	116.19	28.19	102	25

Bread:						
1911.....	717	804	62.50	55.75	42	37
1912.....	607	659	60.06	55.38	40	37
1913.....	592	669	59.94	53.00	39	35
1914.....	576	616	57.50	53.75	43	41
Eggs, butter, and poultry:						
1911.....	74	106	60.38	42.19	61	42
1912.....	79	94	53.38	44.88	52	44
1913.....	120	129	45.63	42.50	42	39
1914.....	90	95	46.38	43.94	38	36
Packing-house products:						
1911.....	614	1,369	185.67	83.28	117	52
1912.....	901	2,035	175.71	77.79	111	49
1913.....	812	1,864	183.31	79.86	127	55
1914.....	776	1,550	153.85	77.02	131	66

From this table it appears that there were more shipments of merchandise and packing-house products in 1914 than in 1911, although fewer than in 1912; that there were more shipments of ice cream, fruits, and vegetables, and eggs, butter, and poultry in 1914 than in 1911, although fewer than in 1913, and that shipments of printed matter and bread steadily decreased from 1911 to 1914. As a whole, an increase in express business since 1911 is shown. In the year 1914, however, there were fewer shipments and less aggregate weight than in 1912 or 1913.

The state commission in argument suggests that the falling off of express business from Sioux City to South Dakota in 1914 was caused by increases in interstate rates following our order in Express Investigation, supra. We are referred to complainant's testimony that the disparity in the rate relationships was aggravated by the new schedules of interstate rates. The state commission has likewise compared these schedules with the rates which they replaced. This evidence we reproduce in part in the following table which shows express rates per 100 pounds from Sioux City to certain South Dakota points in effect prior to February 1, 1914, and those effective on that date. No point of destination is shown in the exhibit of the state commission to which the distance exceeds that to Aberdeen, 265.3 miles:

61

From Sioux City to—	Miles.	Merchandise rates, in effect Jan. 31, 1914.	First-class rate, effective Feb. 1, 1914.	Scale "N" rate, in effect Jan. 31, 1914.[1]	Second-class rate, effective Feb. 1, 1914.
Elk Point	20.7	50	70	40	53
Vermillion	35.2	50	90	40	68
Gayville	49.6	60	90	50	68
Yankton	61.2	75	90	60	68
Harrisburg	81.9	75	90	60	68
Avon	99.8	90	140	75	105
Lake Andes	127.3	125	140	100	105
Platte	149.7	125	140	100	105
Wolsey	191.3	150	180	120	135
Mellette	243.7	150	200	120	150
Aberdeen	265.3	175	200	140	150

[1] Scale "N" embraced rates on the so-called "general specials," comprising principally articles of food. Second-class rates are now applied.

It should not be inferred from such comparisons, however, that the express rates prescribed in the Express Investigation, supra, resulted uniformly in increased charges. Substantial reductions were made in the express schedules considered as a whole, see Express Investigation, 35 I. C. C., 3, 6, and particularly in the charges for packages weighing less than 100 pounds. In the following table are shown the charges in cents for packages of various weights less than 100 pounds, effective from Sioux City to points named in the foregoing table, prior to February 1, 1914, on that date, and the current charges which became effective September 1, 1915:

From Sioux City to—	5 pounds.	10 pounds.	15 pounds.	20 pounds.	25 pounds.	30 pounds.	35 pounds.	40 pounds.	45 pounds.	50 pounds.	60 pounds.	70 pounds.	80 pounds.	90 pounds.	100 pounds.
Elk Point (20.7 miles):															
Prior to Feb. 1, 1914	25	30	30	30	35	40	40	40	40	45	50	50	50	50	50
Feb. 1, 1914	22	25	27	30	32	35	37	40	42	45	50	55	60	65	70
Sept. 1, 1915	27	29	32	34	36	38	41	43	45	47	52	56	61	65	70
Gayville (49.6 miles):															
Prior to Feb. 1, 1914	30	35	35	35	40	45	45	50	50	55	60	60	60	60	60
Feb. 1, 1914	23	27	30	34	37	41	44	48	51	55	62	69	76	83	90
Sept. 1, 1915	28	31	35	38	41	44	48	51	54	57	64	70	77	83	90
Harrisburg (81.9 miles):															
Prior to Feb. 1, 1914	35	40	40	40	45	50	50	55	60	60	70	75	75	75	75
Feb. 1, 1914	23	27	30	34	37	41	44	48	51	55	62	69	76	83	90
Sept. 1, 1915	28	31	35	38	41	44	48	51	54	57	64	70	77	83	90
Avon (99.8 miles):															
Prior to Feb. 1, 1914	40	45	45	50	55	60	65	70	75	75	85	90	90	90	90
Feb. 1, 1914	26	32	38	44	50	56	62	68	74	80	92	104	116	128	140
Sept. 1, 1915	31	36	42	48	54	59	65	71	77	82	94	105	117	128	140
Platte (149.7 miles):															
Prior to Feb. 1, 1914	40	50	55	60	65	70	75	80	90	100	110	125	125	125	125
Feb. 1, 1914	26	32	38	44	50	56	62	68	74	80	92	104	116	128	140
Sept. 1, 1915	31	36	42	48	54	59	65	71	77	82	94	105	117	128	140
Wolsey (191.3 miles):															
Prior to Feb. 1, 1914	45	55	60	70	75	80	85	90	100	100	120	140	150	150	150
Feb. 1, 1914	28	36	44	52	60	68	76	84	92	100	116	132	148	164	180
Sept. 1, 1915	33	40	48	56	64	71	79	87	95	102	118	133	149	164	180
Mellette (243.7 miles):															
Prior to Feb. 1, 1914	45	55	60	70	75	80	85	90	100	100	120	140	150	150	150
Feb. 1, 1914	29	38	47	56	65	74	83	92	101	110	128	146	164	182	200
Sept. 1, 1915	34	42	51	60	69	77	86	95	104	112	130	147	165	182	200
Aberdeen (265.3 miles):															
Prior to Feb. 1, 1914	50	60	65	75	85	90	100	100	100	100	120	140	160	175	175
Feb. 1, 1914	29	38	47	56	65	74	83	92	101	110	128	146	164	182	200
Sept. 1, 1915	34	42	51	60	69	77	86	95	104	112	130	147	165	182	200

It appears from this table that large reductions were made in interstate charges for the lighter packages. In our general investigation it was found by most extensive examination of express records that approximately one-half of the express business consists of packages under 20 pounds in weight; and the average shipment, including carloads of horses and of fruit and vegetables, is but 34 pounds. Express Investigation, 24 I. C. C., 380, 428.

The fact that there has not been greater increase in express busines from Sioux City to South Dakota points since 1911 finds further explanation, according to the view of the state commission, in the very material development of South Dakota industries which has taken place in those years. In Mitchell there are two ice cream plants, one wholesale grocery, one wholesale furniture house, two fruit companies, two wholesale beer distributors, two establishments selling butter, eggs, and produce, two wholesale cigar houses, three wholesale printing houses, three bakeries, two auto and supply companies. Of these the larger number have been established within the last three or four years. Mitchell is served by both defendants, which operate over two lines of railroad running in several directions from the city. Evidence of a similar character was offered as to other distributing centers of South Dakota, such as Sioux Falls and Aberdeen.

63 Other facts intended to lead to the same conclusion are emphasized. In 1910 there were 36 manufacturers of ice cream in the state. The butter fat used annually by them was valued at approximately $70,000. In 1914 there were 67 manufacturers using in that year butter fat worth $270,000. In 1909 the state legislature enacted a law which requires that ice cream manufactured or sold in the state shall contain 14 per cent butter fact. In Iowa the legal requirement is 12 per cent. The South Dakota statute is said to have resulted in fewer purchases from manufacturers located outside of the state. In 1910 30,639,626 pounds of ice cream were produced and sold in the state; in 1915, 46,537,795 pounds. It is likewise shown that a change has taken place in the business of retailing drugs. Formerly retailers gave relatively few orders to distributing houses and carried large stocks, whereas in recent years they have given smaller and more frequent orders. This has created a demand for quicker service with its concomitant result of increasing the number of distributing houses and localizing their distribution. Explanation of the slow growth of Sioux City's express trade in South Dakota is further traced to improvement in the organization and business methods of South Dakota jobbers, to their more intimate acquaintance with local needs, to their increased use of the parcel post, and to the loyalty of South Dakota purchasers to the industries of their state.

After reviewing all of the evidence offered by the state commission on this phase of the case, however, the conclusion is unavoidable that the essential allegations of the complaint have been established. There is active competition between Sioux City shippers and shippers located in the state of South Dakota for the trade of that state in such commodities as commonly move by express. There

are large differences between the interstate and intrastate express rates applicable to the transportation of these commodities for equal distances. These differences in rates place a burden upon interstate shippers and give a corresponding advantage to intrastate shippers, thus accomplishing an inevitable restriction of shipments in interstate commerce or shrinkage of profits.

Transportation Conditions.

Witnesses for the complainant and for the defendants testified that the circumstances and conditions of transportation by express between Sioux City and South Dakota points are substantially the same as those obtaining on transportation between the jobbing cities of South Dakota and other points within that state. The rate expert of the state commission testified that there is no material difference in transportation or operating conditions in northwestern Iowa and southeastern South Dakota. Annexed to an exhibit of this witness, which compares South Dakota freight rates with the lower freight schedules of the state of Iowa, is a statement that there are no material differences in operating, traffic, or other conditions as between the territory in southeastern South Dakota and the territory in northwestern Iowa, in which Sioux City is located * * *.

The state commission, however, places some emphasis upon one fact with relation to express service in South Dakota. This has to do with the collection and delivery of packages. There are 388 express stations in South Dakota at but 40, or 10.3 per cent, of which is the service of collection and delivery maintained. Evidence offered by the state commission and intended to show the actual extent of collection and delivery service in South Dakota may be summarized as follows: Of shipments received by Wells Fargo & Company at South Dakota stations in September, 1913, 61.2 per cent were not given delivery service; in January, 1914, 56.6 per cent; in November, 1913, 57.8 per cent. Of shipments forwarded by the same company from South Dakota stations in September, 1913, 20.6 per cent were not collected; in January, 1914, 27.4 per
64 cent; in November, 1913, 25.8 per cent. The service of collection and delivery, however, is accorded to Sioux City and to competing cities in South Dakota. Whether or not delivery of packages is made at the stations to which the shipments move, it is obvious that the same service is rendered whether the transportation is from Sioux City or from the South Dakota cities with which it competes. The facts thus brought to our attention by the state commission do not, therefore, show a difference in the circumstances and conditions of transportation. They seem to have been urged in part as showing the propriety of a lower level of express rates for intrastate traffic than might reasonably be made effective for such interstate shipments as receive in larger measure the service of collection and delivery.

The contention is also made that Sioux City is compensated for the unequal relation of express rates in the enjoyment of freight service which is better in certain respects than that of the South

Dakota cities. This is especially urged in the brief of the South Dakota cities. It is clear, however, that the right to a proper relation of express rates is not qualified by differences of freight service.

In the foregoing paragraphs we have reviewed the facts upon which the state commission places special emphasis in support of its position in this case. There remains for brief consideration the evidence offered at considerable length by defendants.

Defendant's Evidence.

This evidence is intended chiefly to show that the discrimination, as alleged in the complaint and admitted by the answers, does in fact exist, and that the state schedules of express rates are too low to form the measure of reasonable interstate rates applicable between Sioux City and South Dakota points and to other interstate movements from and to points in that state. We shall not review this evidence in detail. Certain statistics, directed especially to our attention, show that the South Dakota intrastate express business of the American Express Company for the year ended June 30, 1915, estimated on the business of two representative days, yielded 60.9 per cent of the revenue which the same business would yield under the contemporaneously effective interstate rates for similar distances, while the intrastate business of Wells Fargo & Company for the month of November, 1913, yielded 58.3 per cent of the revenue similarly computed. As a result of defendants' efforts and those of state commissions to make the system established by this Commission of uniform application throughout the United States, aided in some instances by modifications of our order, the rates, rules, and regulations prescribed by us have been adopted in 40 states, and more than 90 per cent of the express business of the country is now being handled thereunder. Express Investigation, 35 I. C. C., 3, 4.

Conclusions.

The state commission asks us to distinguish this case from Railroad Commission of La. v. St. L. S. W. Ry. Co., 23 I. C. C., 31; 234 U. S., 342, familiarly known as the Shreveport Case, by reason of certain considerations which we shall state by quotation from its brief. We are referred to Saunders & Co. v. Southern Express Co., 18 I. C. C., 415, in which under facts in part similar to those now before us, the Commission held the case in abeyance pending the determination of court proceedings. The state commission in the statements of its contentions, quoted in the following paragraphs, has paraphrased certain references made by Commissioner Prouty to that case in his concurring opinion in the Shreveport Case, supra, p. 49:

65 1. There is no claim of any intent to prefer Sioux Falls or any other South Dakota city to Sioux City or any other city in an adjoining state; the express rates in question are those of the South Dakota Railroad Commission, applicable over all lines.

The defendants take issue with the state commission upon the

principal fact underlying this contention. They ask us to find that the rates on state business were arbitrarily made without due investigation, without any consideration as to whether or not they were compensatory, and for the purpose of unduly favoring South Dakota shippers.

The circumstances surrounding the making of the intrastate express rates are sufficiently disclosed in the foregoing footnote quoted from the brief of the state commission. It is there frankly stated that the act of legislation requiring the reduction of intrastate express rates "was in some sense, at least, a retaliatory measure," but the record before us affords no justification for the assertion that the intrastate rates were reduced for the purpose of unduly favoring South Dakota shippers as against their Sioux City competitors. The matter of intention may be of importance under some circumstances in an issue of this character, but it can not be controlling. We have before us the relation of express rates as they now exist and it is our duty to determine whether this relation affects such discrimination as the act condemns. If such discrimination is shown it is none the less our duty to require its removal, although the cause of the unlawful relation may have had its origin in motives which are above criticism. On the other hand, if such discrimination is not shown an order based upon a finding of wrongful intention would find no warrant in law.

2. To hold that those (intrastate) rates are unduly low would be of necessity to hold that the South Dakota schedule as a whole is unduly low, and there is no evidence upon which the Commission could properly do that. On the other hand, it does seem clear that the rates from Sioux City are unduly high, or certainly that rates as low as those prescribed by the South Dakota commission, if applied from Sioux City, might not be unduly low.

Here the state commission frankly suggests that the intrastate express rates might be unduly low if applied from Sioux City to South Dakota points. Although a finding that the intrastate rates are too low for application from Sioux City may, in inference, imply a similar judgment with regard to the intrastate schedule as a whole, or may, in consequence, result in the readjustment of those schedules, the fact remains that the intrastate rates as a whole are not directly involved in this case. We have referred to the answers of the defendants as containing allegations which would broaden the issues and bring before us for review the relation of express rates for other movements than those between Sioux City and South Dakota points, on the one hand, and between points in that state, on the other. Such movements would embrace transportation by express between points in South Dakota and points in Minnesota, Iowa, Nebraska, Wyoming, Montana, and North Dakota. Upon such an inquiry other interests than those which appear before us here would be entitled to be heard. We shall limit our findings to the allegations of unreasonableness and unjust discrimination found in the complaint.

3. The reasonableness of the express rates under consideration is being contested before the federal court of the United States, and a course which might be adopted by the Commission in this case in

harmony with precedent would be to retain the complaint in this case on the docket, where it might be made the subject of further investigation.

66 The suit in equity now pending in the district court of the United States for the district of South Dakota does not bring into issue, strictly speaking, the reasonableness of the intrastate rates. The inquiry there is whether the state has overstepped the constitutional limit by making the express rates so unreasonably low that the carriers are deprived of their property without due process of law and denied the equal protection of the laws. The Minnesota Rate Cases, 230 U. S., 352, 433. Holmes & Hallowell Co. v. G. N. Ry. Co., 37 I. C. C., 627, 635. If it should be held in that case that the intrastate express rates are not confiscatory, it would still be the duty of this Commission, for which it has full power, to require the removal of an unjust discrimination against interstate commerce. The state commission points to Saunders & Co. v. Southern Express Co., supra, as a precedent for withholding an order pending the conclusion of court proceedings. Our action in that case was taken before the decision of the Supreme Court in the Shreveport Case, supra, at a time when some doubt existed as to our authority to remove unjust discriminations caused by the relation of interstate and intrastate rates. Circumstances may undoubtedly arise which would make it proper for this Commission to withhold its order, but it is clearly under no requirement to do so, for through the delays of litigation such a requirement would make it possible to maintain and perhaps indefinitely prolong a discrimination which unjustly restricted the free movement of commerce between the states. In the case before us there is no warrant for withholding our order. The complaint was filed on July 13, 1914. Testimony offered by the complainant and defendants was taken on October 26 and 27, 1914. A further hearing, granted on request of the state commission, was not held until September 24, 1915, owing in part to the requests of that commission for sufficient time in which to prepare and present its evidence. Briefs have been filed and the parties have been fully heard in oral argument. There is no suggestion that the record is incomplete or that further evidence would be of value in determining the issues before us. The complainant has shown that unjust discrimination exists for which it is entitled to relief. We think, therefore, that an order should be entered without further delay.

4. Should the Commission find that the circumstances of transportation from Sioux City and from Sioux Falls are the same, and should it, upon the finding, order the express companies to remove discrimination by putting into effect the same rates from these two points, a compliance with such an order would require the express companies either to reduce their Sioux City rate or to assume the burden of showing that the South Dakota intrastate express rates established by the state commission are unduly low.

In the sentence of his opinion which follows those thus paraphrased Commissioner Prouty said:

It did not seem to me just to cast this onus upon the carrier until

we had gone far enough in our investigation to be willing to say ourselves how the discrimination should be corrected. 23 I. C. C. 31, 49.

This Commission had not then made the exhaustive investigation of express rates which has since been completed. Express Investigation, supra. We are here under no doubt as to how the unjust discrimination found to exist should be corrected, for the record conclusively shows that the South Dakota rates are too low to be made the measure of interstate rates between Sioux City and South Dakota points, while there is no proof that the rates which this Commission has approved are unreasonable, nor has a basis been laid for a modification of our order.

67 We accordingly find:

(1). That rates for the interstate transportation of shipments by express between Sioux City, Iowa, and points in the state of South Dakota heretofore prescribed by us as reasonable have not been shown to be unreasonable.

(2). That the defendants maintain higher interstate rates between Sioux City and points in the state of South Dakota than between Sioux Falls, Mitchell, Aberdeen, Watertown, and Yankton, S. Dak., and points in the same state applicable to shipments by express which are transported under substantially similar circumstances and conditions.

(3). That thereby an undue preference is given to Sioux Falls, Mitchell, Aberdeen, Watertown, and Yankton, and an undue and unreasonable prejudice and disadvantage is effected against Sioux City.

(4). That the defendant should cease and desist from continuing said undue preference and unjust discrimination.

An appropriate order will be entered.

68 EXHIBIT C.

Order.

At a General Session of the Interstate Commerce Commission, Held at its Office in Washington, D. C., on the 23d Day of May, A. D. 1916.

No. 7101.

TRAFFIC BUREAU OF THE SIOUX CITY COMMERCIAL CLUB
v.
AMERICAN EXPRESS COMPANY and WELLS FARGO & COMPANY.

This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That the above-named defendants, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before August 15, 1916, and thereafter to abstain, from publishing, demanding, or collecting higher rates for the transportation of shipments by express between Sioux City, Iowa, and points in the state of South Dakota, than are contemporaneously published, demanded, or collected for transportation under substantially similar circumstances and conditions for substantially equal distances between Sioux Falls, Mitchell, Aberdeen, Watertown, and Yankton, S. Dak., on the one hand, and said points in the state of South Dakota, on the other, which said relation of rates has been found by the Commission to be unjustly discriminatory.

And it is further ordered, That this order shall continue in force for a period of not less than two years from the date when it shall take effect.

By the Commission.

[SEAL.] GEORGE B. McGINTY, *Secretary.*

69 EXHIBIT D.

Before the Board of Railroad Commissioners of the State of South Dakota.

Docket No. F-338.

IN THE MATTER OF AN INVESTIGATION INTO THE RATES, RULES, Practices, Regulations, and Classifications Governing the Intrastate Transportation of Express Freight in This State.

DOUGHERTY, *Commissioner:*

At the twelfth session of legislature of this state there was passed Chapter 152 of the Session Laws of 1911 commanding the Board of Railroad Commissioners of this state to prepare for each of the express companies doing business in this state, within sixty days from the effective date of said statute, a schedule of rates which should not exceed seventy per cent of the lowest rates in effect for the transportation of express freight on January 1, 1909. In obedience to said statute the board, on May 2, 1911, issued South Dakota Express Distance Tariff No. 2, to become effective May 15, 1911. On May 13, 1911, certain of the express companies brought suits in the United States Circuit Court, (now United States District Court), to restrain the enforcement or putting into effect of these rates on the ground that they were confiscatory. A hearing was had on their application for a temporary injunction before Hon. Charles E. Willard, United States District Judge, at Minneapolis, on September 6 and 7, 1911, at which time the application of the express companies for a temporary injunction was denied, and they were given until September 21, 1911, to put the schedule of rates into effect.

These rates have been in effect without modification or change ever since that date. At the 1911 session of the legislature there was passed Chapter 207, conferring, for the first time in the history of this state, upon the Board of Railroad Commissioners, full and complete jurisdiction over express companies to regulate and control the method and the manner of conducting the express business in this state, and to make rules and regulations governing the transaction of such business, and to fix and determine any and all charges made to the public for the carrying of express freight. On July 13, 1914, the Traffic Bureau of the Sioux City Commercial Club filed with the Interstate Commerce Commission a complaint against the American Express Company and Wells-Fargo & Company, alleging substantially as follows:

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"That the said defendants are parties to and concur in Local and Joint Schedule of First and Second Class Express Rates, I. C. C. No. A-2, South Dakota Section I. C. C. No. A-3 and Local and Joint Block Tariff I. C. C. No. A-262, naming express rates from Sioux City, Iowa to points in the state of South Dakota. That the said express rates charged and collected from Sioux City, Iowa to the said points are unjust, unreasonable and excessive in and of themselves and are therefore in violation of the Act to Regulate Commerce with amendments thereof and supplements thereto.

That the members of complainant come into daily competition with persons, firms and corporations engaged in similar lines of business at Sioux Falls and other jobbing and distributing centers in the state of South Dakota in the sale of goods to the points in issue herein; that all conditions proper to be considered in the making of express rates are substantially the same from Sioux City as from Sioux Falls and other South Dakota centers to the points in question; that, notwithstanding these facts, the express rates from Sioux City to the said points are very much higher than from Sioux Falls and other South Dakota centers to points of equal distance in the said state; that the said adjustment of express rates from Sioux City to the said points is therefore unjustly discriminatory and subjects the members of complainant and Sioux City as a jobbing center to undue and unreasonable prejudice and disadvantage, and is therefore in violation of the Act to Regulate Commerce with amendments thereof and supplements thereto.

"That, prior to September, 1911, the general level of express rates from Sioux City, Iowa, to the said points in the state of South Dakota was substantially the same as the general level of express rates from Sioux Falls and other South Dakota centers to points of equal distance in the said state; that, during the said year of 1911, the Board of Railroad Commissioners of said state promulgated a distance schedule of express rates which was more than thirty per cent lower than the old rates, and ordered the defendants herein to publish and apply the same between all points in the said state of South Dakota; that, the defendants did publish the said distance schedule of express rates and have been and are now applying the same between all points in the said state; that the said schedule, promulgated as a reasonable schedule, is lower in some in-

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stances than the maximum schedule of freight rates applicable in said state, and the rates resulting from its application are such, added to the interstate rates of defendants from Sioux City, Iowa to the first station west thereof in South Dakota, as to make a lower combination than the through interstate rates to many points in the said state; that, notwithstanding the fact that the relative adjustment of said rates to the said South Dakota points from Sioux City, Iowa under interstate express rates and Sioux Falls and other state centers under the said state schedule of express rates is unjustly discriminatory and subjects complainant's members and Sioux City, Iowa as a distributing center to undue and unreasonable prejudice and disadvantage, the said defendants continue to maintain the same in violation of the Act to Regulate Commerce with acts amendatory thereof and supplemental thereto."

The defendants answered, denying that the express rates applying on interstate business from Sioux City to points in South Dakota were unjust, excessive, or unreasonable, and confessed that the discrimination complained of existed and alleged affirmatively that it was created by the schedule of rates promulgated by the Board of Railroad Commissioners of the State of South Dakota, and in their answers attempted to broaden the issue for the purpose of using this proceeding before the Interstate Commerce Commission as the entering wedge to upset the entire schedule of South Dakota intrastate express rates; and asked the Interstate Commerce Commission to require the putting into effect of its block or zone system of rates, approved as a result of its investigation, the decisions as to which appear in 24 I. C. C. 381, 28 I. C. C. 131, 35 I. C. C. 3. The Adams
Express Company intervened in this proceeding and joined
72 in the answer filed by the original defendants. The Board of Railroad Commissioners of this state intervened, as did also some of the commercial associations and the Chicago and Northwestern Railway Company. Two hearings were held. Complainant's and defendants' testimony was offered at the hearing held in Sioux City, October 26 and 27, 1914, and the testimony submitted on the part of the Board of Railroad Commissioners of this state was introduced at the hearing held at Sioux City on September 24, 1915. Prior to the filing of this complaint by the Sioux City interests, neither the express companies themselves nor any person acting for or in behalf of the city of Sioux City, or of its commercial club or of the traffic bureau of its commercial club, ever filed any complaint with, or brought to the attention of the Board of Railroad Commissioners of the State of South Dakota the alleged discrimination set forth in the complaint filed with the Interstate Commerce Commission. About July 1, 1916, this board received from the Interstate Commerce Commission its report and order in this case. In its report, the Interstate Commerce Commission finds as follows:

"(1) That rates for the interstate transportation of shipments by express between Sioux City, Iowa, and points in the state of South Dakota heretofore prescribed by us as reasonable have not been shown to be unreasonable.

(2) That the defendants maintain higher interstate rates between

Sioux City and points in the state of South Dakota than between Sioux Falls, Mitchell, Aberdeen, Watertown, and Yankton, S. Dak., and points in the same state applicable to shipments by express which are transported under substantially similar circumstances and conditions.

(3) That thereby an undue preference is given to Sioux Falls, Mitchell, Aberdeen, Watertown and Yankton, and an undue and unreasonable prejudice and disadvantage is effected against Sioux City.

(4) That the defendants should cease and desist from continuing said undue preference and unjust discrimination."

73 The material portion of its order reads as follows:

"That the above named defendants, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before August 15, 1916, and thereafter to abstain, from publishing, demanding, or collecting higher rates for the transportation of shipments by express between Sioux City, Iowa, and points in the state of South Dakota, than are contemporaneously published, demanded, or collected for transportation under substantially similar circumstances and conditions for substantially equal distances between Sioux Falls, Mitchell, Aberdeen, Watertown, and Yankton, S. Dak., on the one hand, and said points in the state of South Dakota, on the other, which said relation of rates has been found by the Commission to be unjustly discriminatory.

And it is further ordered, that this order shall continue in force for a period of not less than two years from the date when it shall take effect."

About July 3, 1916, counsel for the express companies requested that a conference be had between the representatives of the express companies and this commission, and Mr. Childe, representing the Sioux City Commercial Club and the representatives of the jobbers and commercial clubs of this state, and after some little negotiation, it was arranged to hold this conference at the offices of this Commission, in Pierre, on July 27, 1916, at ten o'clock A. M. At that time the express companies were represented by traffic officers and counsel. Mr. Childe did not appear, but we are advised that he arrived in the city after the conference was over. The commercial clubs were present with a large representation, including the heads of their respective rate departments. For the first time, the Great Northern Express Company participated, and was represented by C. H. Quirmback, its superintendent of traffic. At that time, the representatives of the legal and traffic departments of the express companies orally applied for permission to put into effect on intrastate traffic in this state the modified block or zone system of rates, approved by the Interstate Commerce Commission in its investi-

73½ gation. Prior to coming into the conference, the representatives of the commercial clubs and jobbers of the state held a meeting at the St. Charles Hotel, and appointed a chairman, Mr. Alan R. Fellows of Sioux Falls, who was delegated to act as spokesman in the conference. The proposition from the express companies

to put into effect on intrastate traffic in this state the system of zone or block rates, approved by the Interstate Commerce Commission, was quite strenuously opposed on behalf of the jobbers and commercial clubs by their spokesman, Mr. Fellows. The conference, after remaining in session about one hour, was then adjourned until one thirty o'clock in the afternoon, and this commission, in the interim, received a delegation from, and conferred with, the representatives of the jobbers and shippers, and remained in conference for about an hour, without arriving at any agreement. At one thirty P. M., the conference was resumed and was finally adjourned on the announcement from this commission that the entire matter was under consideration, and it had not arrived at any conclusion and was not in a position at that time to announce its decision. Since the conference the matter has received very careful consideration, although we admit that the time has been insufficient in which to make a thorough and exhaustive investigation.

Under our state statute, as it now stands, and we are now referring to Chapter 207 of the 1911 Session Laws, it is the duty of this commission in the exercise of that judgment with which it may be endowed, to prescribe for application on intrastate traffic in this state a schedule of reasonable rates. It is contended, on the one hand, by the express companies and the representatives of the Sioux City interests, that the schedule of rates promulgated by this commission, under the provisions of Chapter 152 of the Session Laws of 1911,

is unreasonably low; and, on the other hand, by the jobbers
74 and representatives of the commercial clubs, that the block

or zone system of rates, approved by the Interstate Commerce Commission, is unreasonably high. It is perhaps true that the schedule of rates promulgated by this commission is not a logical schedule of rates, and our examination since the conference discloses some peculiarities in the zone or block system of rates, approved by the Interstate Commerce Commission. Utica is seventy and nine-tenths miles from Sioux City, and the express rate is ninety cents. Lesterville, six and seven-tenths miles farther distant on the same line, has an express rate of one dollar and fifteen cents, a difference of twenty-five cents in the rate for a difference in mileage of six and seven-tenths miles. Again, Delmont, Armour and Stickney are on a branch line from Tripp. The rate from Sioux City to Tripp is one dollar and fifteen cents. Delmont is ten and four-tenths miles farther distant, and its rate is one dollar and forty cents. At Armour the express rate from Sioux City exceeds by eight cents, three times the first class freight rate. At Alcester, the express rate from Sioux City exceeds by twenty-one cents, three times the first class freight rate. At Avon, the express rate from Sioux City exceeds by twenty-four and one-half cents, three times the first class freight rate. At Elk Point, Esmond, and Iroquois, the express rate from Sioux City exceeds by nineteen cents, three times the first class freight rate. At Jefferson, and Junius, the express rate from Sioux City exceeds by twenty-two cents, three times the first class freight rate. At Lesterville, the express rate from Sioux City exceeds by sixteen cents, three times the first class freight rate. We have for the purposes of

this illustration quoted rates and distances from Sioux City as shown in Childe's Exhibit 2 most frequently quoted by complainant and the express companies and commented on by the Interstate
75 Commerce Commission in the Sioux City case. There are numberless other instances of similar situations created by this block or zone system of rates approved by the Interstate Commerce Commission. We do not wish to be understood as condemning the system of rates approved by the Interstate Commerce Commision, but we do wish to be understood as saying that we are not in a position at this time to say that the system of zone or block rates approved by the Interstate Commerce Commission are fair and reasonable rates to apply on intrastate traffic in the state of South Dakota. In the case brought by the Traffic Bureau of the Sioux City Commercial Club before the Interstate Commerce Commission, in Paragraph IV of the complaint, there was a direct allegation that the interstate rates applying from Sioux City to points in South Dakota, are unjust, unreasonable, and excessive in and of themselves, but no evidence was introduced by complainant on this question. In fact, there was not introduced in that case any evidence as to the reasonableness of the system of zone or block rates approved by the Interstate Commerce Commission, and as this commission was not a party to the original investigation of the Interstate Commerce Commission, we are unable to say that the rates approved in that case constitute a fair and reasonable basis of rates to apply on intrastate traffic in this state. With this situation confronting us, what is the plain duty of this commission? After very careful consideration we are quite clearly of the opinion that it is the duty of this commission to enter upon an investigation for the purpose of determining and fixing a fair, just and reasonable basis of rates, rules, regulations and classifications to apply on and govern the intrastate transportation of express freight in this state, and an order will therefore be made and entered in this proceeding instituting such an investigation.

76 At the conference held between the representatives of the express companies and the representatives of the jobbers and commercial clubs and this commission in this city on July 27, all of the express companies, including the Great Northern Express Company, which was not a party to the case brought by the Traffic Bureau of the Sioux City Commercial Club, notified this commission and the representatives of the jobbers and the commercial clubs, that on August 15, 1916, they would put into effect from the stations of Aberdeen, Watertown, Sioux Falls, Mitchell and Yankton, to all points in the state of South Dakota, the block or zone system of rates approved by the Interstate Commerce Commission in its investigation.

The rates which shall be put into effect to remove the discrimination found by the Interstate Commerce Commission to exist in favor of jobbers at Aberdeen, Watertown, Sioux Falls, Mitchell and Yankton, and against Sioux City and its jobbers, have not yet been determined. As these rates are to apply on intrastate traffic and between stations and over lines wholly within this state, this com-

mission is the proper tribunal to fix these rates. To permit the putting into effect of two systems of rates, one from the cities named and another from all other cities in the state, would create an intolerable situation.

Under the statutes of this state, no rate, rule, practice, regulation, or classification, having the ultimate effect of increasing intrastate rates, may be put into effect without the approval of this Board. For the reasons which we have set forth above, we are unable to, and must decline to approve, as applying on intrastate traffic in this state, the block or zone system of rates approved by the Interstate Commerce Commission; nor are we able to approve this sys-
77 tem of rates for application on intrastate traffic to points in this state from the stations of Aberdeen, Watertown, Sioux Falls, Mitchell, and Yankton.

An order will be entered accordingly.

Done in regular session at the city of Pierre, the Capital, on this 5th day of August, 1916.

By order of the Board.

[SEAL.] H. A. USTRUD, *Secretary.*

78 EXHIBIT E.

At a Regular Session of the Board of Railroad Commissioners of the State of South Dakota begun and held at its offices at the city of Pierre, the Capital, on this 5th day of August, 1916.

Present: Commissioners Dougherty and Murphy.

Docket No. F-338.

IN THE MATTER OF AN INVESTIGATION INTO THE RATES, RULES, Practices, Regulations, and Classifications Governing the Intrastate Transportation of Express Freight in This State.

In this proceeding this board having conducted an investigation and made and filed its report in writing, a copy whereof is hereto attached and made part hereof, and this board being fully advised in the premises, and sufficient cause for this order appearing,

It is Ordered, That this board, on its own initiative and without complaint, proceed to investigate into, and to fix and determine a fair, reasonable and non-discriminatory basis, system or schedule of rates, and fair, reasonable and non-discriminatory rules, practices, regulations and classifications governing the transaction of the intrastate express business in this state; and that said matter be, and hereby is set down for hearing at the offices of this board in the city of Pierre, the Capital, on Monday, the fourth day of December, 1916, at the hour of ten o'clock in the forenoon of said day; that the Adams Express Company, The American Express Company, Great Northern Express Company, Wells-Fargo & Company, Western Express Company, Chicago, Burlington & Quincy Railroad Com-

pany, Chicago, Milwaukee & St. Paul Railway Company, Chicago & North Western Railway Company, Chicago, Rock Island
79 & Pacific Railway Company, Chicago, St. Paul, Minneapolis & Omaha Railway Company, Illinois Central Railroad Company, Great Northern Railway Company, Minneapolis & St. Louis Railroad Company, Pierre, Rapid City & Northwestern Railway Company, Belle Fourche Valley & Northwestern Railway Company, Rapid City, Black Hills and Western Railway Company, Pierre and Ft. Pierre Bridge Railway Company, Watertown and Sioux Falls Railway Company, and Wyoming and Missouri River Railway Company, be and hereby are made parties defendant to this proceeding.

And it is Further Ordered, That the application of the Adams Express Company, American Express Company, Great Northern Express Company, and Wells-Fargo & Company, to put into effect on intrastate traffic in this state from the stations of Aberdeen, Watertown, Sioux Falls, Mitchell, and Yankton, to points in the state of South Dakota, as well as their application to put into effect on intrastate traffic in this state, the system of zone or block rates approved by the Interstate Commerce Commission, until the further order of this board in the premises, be and same hereby is denied.

By order of the Board.

[SEAL.] H. A. USTRUD,
Secretary.

80 EXHIBIT H.

In the District Court of the United States for the Northern District of the State of Iowa, Western Division.

No. —.

BROWN DRUG COMPANY, FENN BROTHERS, JEWETT BROTHERS & Jewett, Sioux Falls Commercial Club of Sioux Falls, South Dakota; Mitchell Commercial Club of Mitchell, South Dakota; Watertown Commercial Club of Watertown, South Dakota; Aberdeen Commercial Club of Aberdeen, South Dakota, and Yankton Commercial Club of Yankton, South Dakota, Plaintiffs,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, American Express Company, and George C. Taylor, as President of said Company, Wells Fargo & Company, Adams Express Company and W. M. Barrett as President of said Company, and Great Northern Express Company, and Sioux City Commercial Club of Sioux City, Iowa, Defendants.

Petition in Equity.

To the Honorable the Judges of said Court:

The plaintiffs above named, being residents and citizens of the State of South Dakota, bring this petition to enjoin, set aside and

annul the order of the Interstate Commerce Commission, hereinafter more specifically referred to, under and pursuant to Chapter 9 of the Judicial Code of the United States, and the provisions of the Act of Congress, approved October 22, 1913, (38 Stat. L.) and for cause of action against the defendants allege:

1.

That the Brown Drug Company, Fenn Brothers and Jewett Brothers & Jewett, are corporations, organized and existing under the laws of the State of South Dakota, each having its principal place of business at the City of Sioux Falls in said State; that each of said corporations is engaged in the business of manufacturing and selling at wholesale at the City of Sioux Falls, and as jobbers and shippers of various goods, wares and merchandise, and
81 selling and shipping its said commodities to retail dealers at various points on the various lines of railroad over and upon which the defendant Express Companies have been and are engaged in business in the State of South Dakota; that each of said corporations have been engaged in such business for a great many years and has invested a large amount of capital in building up and establishing said business, and the volume of the business of each of said corporations amounts to many thousand dollars annually. That the Commercial Club of Sioux Falls, the Commercial Club of Mitchell, the Commercial Club of Watertown, the Commercial Club of Aberdeen and the Commercial Club of Yankton, plaintiffs above named are each incorporated under the laws of the State of South Dakota, each having its principal place of business at the city with which its name is associated and each being engaged in the business of promoting trade and commerce at the respective cities above named. That Wells-Fargo & Company is a corporation organized under the laws of Colorado, and the Great Northern Express Company is a corporation organized under the laws of the State of Minnesota, each of said corporations being a common carrier, engaged in the transportation of express freight within the State of South Dakota, and between the cities hereinbefore named or many of them and between the several states of the United States; that the American Express Company is a voluntary unincorporated association of individuals in the nature of a partnership, organized in the State of New York under the common law, having its principal place of business at the City of New York, and that George C. Taylor is the president thereof, and as such is duly authorized to sue and be sued for and on behalf of said American Express Company, and the several individuals composing the same; that Adams Express Company is a voluntary unincorporated association of individuals in the nature of a partnership, organized in the State of New York under the common law, having its principal place of business at the City of New York, and that W. M. Barrett is the president thereof, and as such is duly authorized to sue and be sued for and on behalf of said Adams Express Company and the persons

composing the same; that the said American Express Com-
82 pany and Adams Express Company are common carriers of express freight, engaged in business as such within the State of South Dakota and between the cities above named in said State, and between the several states of the United States. That said Wells-Fargo & Company, Great Northern Express Company, American Express Company, James C. Fargo as president thereof, Adams Express Company and W. M. Barrett as president thereof, are hereinafter referred to and designated as Express Companies.

2.

That the city of Sioux City is situated in the State of Iowa, its corporate limits extending westward on the Big Sioux River, which stream forms a part of the boundary line between South Dakota, and Iowa; that Sioux City is a city of about sixty thousand population; that the city of Sioux Falls is a city situate in South Dakota, about ninety miles north of Sioux City and has a population of about twenty-five thousand; that the city of Yankton is situated in the State of South Dakota about fifty miles west of the City of Sioux City, and has about six thousand population; that the city of Mitchell is situate in the State of South Dakota, about one hundred twenty-five miles north west of the City of Sioux City and has a population of about ten thousand; that the City of Watertown is situate in the State of South Dakota, about one hundred ninety miles north of Sioux City and has a population of about ten thousand; that the City of Aberdeen is situate in the State of South Dakota, about two hundred fifty miles northwest of the City of Sioux City and has a population of about fifteen thousand; that in Sioux City, Iowa, Sioux Falls, South Dakota, Aberdeen, South Dakota, Watertown, South Dakota, Mitchell, South Dakota, and Yankton, South Dakota, are situated and located persons, firms and corporations engaged as jobbers and wholesalers of various kinds of merchandise, produce and supplies; that each of said cities are served by one or more of the defendant Express Companies and the several jobbers and wholesalers in said cities are dependent upon one or more of the defendant Express Companies for the transportation and distribution of their goods, wares and merchandise by express in the territories
83 contiguous to said cities; that said cities are so situated that the jobbers and wholesalers in the several cities are in competition with each other for the trade in the territory of the State of South Dakota.

3.

That heretofore and pursuant to the powers conferred upon the Board of Railroad Commissioners of the State of South Dakota, by the laws of South Dakota, and particularly by Chapter 159 of the Session Laws of 1909 and by Chapter 152 of the Session Laws of 1911, the said Board of Railroad Commissioners, on or about the 2nd day of May, 1911, did, by an order regularly and lawfully made and entered, prepare for each of the Express Companies doing busi-

ness in said State at that time, a uniform schedule or schedules of reasonable maximum rates and charges for the transportation of express freight between the stations within the State of South Dakota, which rates did not exceed seventy per cent of the lowest rates which were in force for the transportation of express freight over any of the lines of railway between stations within the State of South Dakota on the first day of January 1909; that by said order said Board of Railroad Commissioners did specify that said schedule or schedules so prepared by said Board of Railroad Commissioners should be effective and in force on and after May 15th, 1911; that upon the promulgation of said schedule, schedules and order by said Board of Railroad Commissioners, the defendant Express Companies and others began a suit in the District Court of the United States, for the District of South Dakota, enjoining and restraining the enforcement of said schedule or schedules and order, on the ground that the rates prescribed therein were unreasonable and confiscatory; that an application was presented by said Express Companies to the said District Court of the United States for a temporary injunction restraining the enforcement of said schedule or schedules and order pending the suit; that upon a full hearing on said application for said temporary injunction the same was, on September 21st, 1911, in all things denied; that said suit has never been brought on for trial and is still pending and undetermined in said District Court of the United States; that no appeal has been taken from
84 said order of said District Court denying the application for said temporary injunction; that upon the denial of said application for the temporary injunction by said District Court of the United States said Express Companies adopted and ever since have submitted to said schedule or schedules and order of said Board of Railroad Commissioners and are now carrying intrastate express freight in the State of South Dakota for the rates, tolls and charges specified and prescribed in said schedule or schedules and order.

4.

That the rates prescribed in said schedule or schedules and order of said Board of Railroad Commissioners of the State of South Dakota are just and reasonable rates for the transportation and carrying of express freight intrastate in the State of South Dakota; that by the laws of the State of South Dakota, said schedule or schedules and order of rates prescribed in said schedule or schedules and order are presumed as a matter of law to be reasonable and just rates for the transportation of express freight intrastate in the State of South Dakota.

5.

That prior to the promulgation of the schedule of rates for the interstate transportation of express freight by the Interstate Commerce Commission of the United States, as hereinafter related, the Express Companies operating throughout the States of Iowa, South Dakota and adjoining states, were operating and carrying interstate

express freight upon and under schedules of rates for such transportation voluntarily adopted and promulgated by said Express Companies; that about the year 1912 in a proceeding before the Interstate Commerce Commission of the United States entitled, "In the Matter of Express Rates, Practices, Accounts and Revenue," the Interstate Commerce Commission adopted and promulgated certain schedules of rates to be applied by Express Companies to the interstate transportation of express freight throughout the United States; that the schedule or schedules so adopted and promulgated by the Interstate Commerce Commission applied to all interstate
85 transportation of express freight over and into the States of Iowa, South Dakota and adjoining states; that said schedules of rates for interstate transportation so adopted and promulgated by the Interstate Commerce Commission in many instances prescribed higher rates for the transportation of express freight from points in Iowa, and particularly from the City of Sioux City into the State of South Dakota, than had been prescribed in the schedules of rates theretofore voluntarily adopted and applied to such transportation by the Express Companies themselves; that thereafter and about July, 1915, in the same proceeding the Interstate Commerce Commission made an order modifying the rates for interstate transportation of express freight as prescribed in the schedules previously adopted and promulgated by said Commission, by which modification many of the rates for the interstate transportation of express freight from Sioux City, Iowa into the State of South Dakota were increased and made higher than the rates prescribed in the first schedule adopted and promulgated by the said Interstate Commerce Commission; that said last above named schedule of rates was by the order of said Interstate Commerce Commission made effective and became effective September 1st, 1915.

6.

That about the year 1914, after the first schedule of rates for interstate transportation of interstate express freight had been adopted and promulgated by the Interstate Commerce Commission of the United States, a proceding was instituted before the said Interstate Commerce Commission by the Traffic Bureau of the Sioux City Commercial Club against the Express Companies, which proceeding was entitled, "Traffic Bureau of the Sioux City Commercial Club, complainant, vs. American Express Company et al., defendants," and which proceeding received a docket number on the docket of the Interstate Commerce Commission of "Docket 7101." That in said proceeding it was alleged, among other things, by the complainant, that the rates prescribed by the Interstate Commerce Commission for the interstate transportation of express freight from Sioux City, Iowa to points in South Dakota were unreasonably high and were higher than the rates prescribed by the Railroad
86 Commission of the said State of South Dakota for the intrastate transportation of express freight for like distances; that by reason of the fact that the interstate rates were unreasonably

high, the jobbers, wholesalers and manufacturers of Sioux City were unjustly discriminated against and that by reason of the lower intrastate rates prevailing in South Dakota, the jobbers and wholesalers in the State of South Dakota were enjoying an unjust advantage over jobbers and wholesalers situated in the City of Sioux City, Iowa, in the matter of the distribution of their goods, wares and merchandise in the territory of the State of South Dakota. That upon the initiation of said proceedings before said Interstate Commerce Commission and the filing of answers by the several defendants, a hearing was had before an Examiner appointed therefor by the Interstate Commerce Commission and testimony was submitted by the several parties to said proceedings; that at said hearing the Sioux Falls Commercial Club, the Aberdeen Commercial Club, the Mitchell Commercial Club and the Railroad Commissioners of the State of South Dakota were permitted to intervene and be heard in said proceedings; that thereafter and about May 23, 1916, the Interstate Commerce Commission made its report, findings and conclusions in said proceedings; that said report, findings and conclusions are hereto annexed, marked "Exhibit "A," and made a part of this petition; that thereupon said Interstate Commerce Commission on said 23rd day of May, 1916, at its office in Washington, D. C., made and entered an order in words and figures as follows:

"Order.

At a General Session of the Interstate Commerce Commission, Held at Its Office in Washington, D. C., on the 23rd Day of May, A. D. 1916.

No. 7101.

TRAFFIC BUREAU OF THE SIOUX CITY COMMERCIAL CLUB

v.

AMERICAN EXPRESS COMPANY and WELLS FARGO & COMPANY.

This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having
87 been had, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and enclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, that the above-named defendants, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before August 15, 1916, and thereafter to abstain, from publishing, demanding, or collecting higher rates for the transportation of shipments by express between Sioux City, Iowa and points in the state of South Dakota, than are contemporaneously published, demanded, or collected for trans-

portation under substantially similar circumstances and conditions for substantially equal distances between Sioux Falls, Mitchell, Aberdeen, Watertown, and Yankton, S. Dak., on the one hand, and said points in the State of South Dakota, on the other, which said relation of rates has been found by the Commission to be unjustly discriminatory.

And it is further ordered, that this order shall continue in force for a period of not less than two years from the date when it shall take effect.

By the Commission.

[SEAL.] GEORGE M. McGINTY, *Secretary.*"

That, the defendant Express Companies assume to interpret the said report, findings, conclusions and order of said Interstate Commerce Commission as having abrogated the schedule or schedule and order which was promulgated by the Board of Railroad Commissioners of the State of South Dakota for the intrastate transportation of express freight within the State of South Dakota, and that the discrimination which they are ordered and directed to cease and desist is to be removed entirely by the promulgation and enforcement of a schedule of rates for intrastate shipments of express freight from said cities to other points within the State of South Dakota, equal to or higher than the schedule of rates prescribed by the Interstate Commerce Commission for interstate transportation of express freight in the States of Iowa and South Dakota,

88 and that said defendant Express Companies threaten to, and, unless enjoined and restrained by this Honorable Court from so doing, will, on September 15th, 1916, promulgate, publish and seek to make effective from said cities to other points in the State of South Dakota for the intrastate transportation of express freight in the State of South Dakota, a schedule of rates equal to or higher than the said schedule of rates prescribed by the Interstate Commerce Commission for the interstate transportation of express freight in the States of Iowa and South Dakota and will not make said proposed new schedule of rates applicable between other points of equal distance within said state of South Dakota.

That the imposition, publishing, demanding or collecting by the defendant Express Companies, on and after September 15th, 1916, of rates for the intrastate transportation of express freight from said cities within the State of South Dakota, equal to or higher than the interstate rates above referred to, will impose upon the plaintiffs and upon the shippers in said cities and of the State of South Dakota, a schedule of rates that will be unjust and unreasonable; in this, it will impose upon such shippers charges for such transportation that will be unreasonably high and excessive and that will be unjustly discriminative against the plaintiffs and other jobbers and shippers, doing business at and out of said cities, in favor of jobbers and shippers engaged in like business at other points on the lines of said Express Companies within the State of South Dakota, that by reason of such unjust and unreasonable exactions, the plaintiffs and other shippers in the State of South Dakota will suffer

great and irreparable damage, and be greatly damaged in the transaction of their business in said State.

That under and by virtue of the laws of the State of South Dakota, the defendant Express Companies have no lawful right to promulgate, publish, demand or collect for the transportation of intrastate express freight in the State of South Dakota, a higher rate than the rates prescribed in schedules of rates adopted by the Board of Railroad Commissioners of said State; that as plaintiffs are informed and believe the defendant Express Companies, pre-
89 tend to assume that said report, findings, conclusions and order of the Interstate Commerce Commission, hereinbefore referred to, relieve the said defendant Express Companies, from the necessity of submitting their proposed schedule of rates which they intend to publish and make effective, on or about September 15, 1916, to the Board of Railroad Commissioners of the State of South Dakota for their judgment as to the reasonableness of said rates and for their adoption and approval by said Board of Railroad Commissioners.

That by the wrongful and unlawful acts about to be committed by the defendant Express Companies, in promulgating and making effective such proposed schedules of rates for the intrastate transportation of express freight within the State of South Dakota, without the determination of their reasonableness by the Board of Railroad Commissioners and without the approval and sanction of such Board of Railroad Commissioners of the State of South Dakota, the plaintiffs herein, as well as other shippers of the State of South Dakota, will be deprived of any remedy to protect themselves against the unreasonable charge for such intrastate transportation of express freight, except by independent suits to collect overcharges resulting from such unjust and unreasonable rates by reason whereof, plaintiffs and shippers in the State of South Dakota will become involved in a great multiplicity of suits.

7.

Plaintiffs further allege that the report, findings, conclusions and order of the Interstate Commerce Commission, entered May 23d, 1916, in said proceedings in which the Traffic Bureau of the Sioux City Commercial Club was plaintiff and the American Express Company, et al., were defendants, was and is wrongful and unlawful, in this; that the said interstate Commerce Commission was without jurisdiction to pass upon and determine the question of the reasonableness of the schedule of rates prescribed by the Board of Railroad Commissioners of the State of South Dakota for intrastate transportation of express freight within the State of South Dakota; that in said proceedings there was no legal or competent evi-
90 dence produced before said Examiner or submitted to said Interstate Commerce Commission tending to establish the reasonableness or unreasonableness of said schedule of rates prescribed by said Board of Railroad Commissioners of the State of South Dakota, for the intrastate transportation of express freight

within the State of South Dakota; that the findings, conclusions and order of the Interstate Commerce Commission that said intrastate rates within the State of South Dakota were unreasonably low, was and is without any legal or competent testimony in support thereof; that in the issues presented by the pleadings in said proceedings, no issue of fact or law was presented to said Interstate Commerce Commission relative to the reasonable or unreasonableness of said intrastate rates for the transpor-ation of express freight within the State of South Dakota; that there was no legal or competent evidence submitted in said proceedings before said Examiner or to said Interstate Commerce Commission tending to show the reasonableness or unreasonableness of the interstate rates for the transportation of express freight from the City of Sioux City, Iowa into the State of South Dakota, and that the findings, conclusions and order of the Interstate Commerce Commission that the interstate rate, as applied to shipments of express freight from Sioux City, Iowa, to South Dakota points, was a reasonable and just rate, was and is without any legal or competent evidence in support thereof.

That the order of the Interstate Commerce Commission in said proceeding, directing and commanding that the Express Companies cease and desist, on or before August 15th, 1916, and thereafter to abstain, from publishing, demanding or collecting higher rates for the transportation of shipments of express from Sioux City, Iowa, and points in the State of South Dakota, than are contemporaneously published, demanded or collected for transportation under substantially similar circumstances and conditions for substantially equal distances between Sioux Falls, Mitchell, Aberdeen, Watertown, and Yankton, South Dakota, on the one hand, and said points in the State of South Dakota, on the other, is beyond the jurisdiction and lawful powers of said Interstate Commerce Commission, in this; that under the laws of the United States
91 and under the laws of the State of South Dakota, said Express Companies are without authority of law, and by said statutes are deprived of the power, to make and promulgate and establish schedules of rates for the transportation of express freight either interstate or intrastate without such schedule of rates having first been found to be reasonable and approved,—the interstate rates by the Interstate Commerce Commission and the intrastate rates by the Board of Railroad Commissioners of the State of South Dakota,—and that the Interstate Commerce Commission was without authority of law to delegate or submit to the defendant, Express Companies, the right and power to name rates for the purpose of relieving the Sioux City jobbers and shippers from the alleged discrimination without any finding by either the Interstate Commerce Commission or the Board of Railroad Commissioners of the State of South Dakota, that the rates so to be promulgated and made effective are reasonable and just rates.

That said report, findings, conclusions and order of the Interstate Commerce Commission was without authority of law in this; that the damage which the jobbers, wholesalers and shippers of South Dakota will suffer from the increased rates will exceed many fold

the damage claimed or pretended to be suffered by the jobbers and wholesalers of Sioux City under existing conditions; that it will be a wrongful and unjust imposition, and a broad and irreparable damage upon the jobbers, wholesalers and shippers of South Dakota for the relief and benefit of the few shippers and wholesalers of Sioux City, Iowa; that the said Interstate Commerce Commission in its said report, findings, conclusions and order did not take into consideration and entirely omitted to consider the great and irreparable injury which the jobbers, wholesalers and shippers of South Dakota would suffer as compared with the amount of damage which the few jobbers and wholesalers of Sioux City claim and pretend to be suffering under the alleged discriminations.

That the results of the imposition of such exactions under the unreasonably high rates for the intrastate transporta-ion of express freight within the State of South Dakota, upon the plaintiffs
92 and other jobbers, wholesalers and shippers in said State of South Dakota, will deprive the plaintiffs and such jobbers, wholesalers and shippers within the State of South Dakota, of their property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States.

8.

That the amount involved in this suit, exclusive of interest and costs is largely in excess of the sum of Three thousand dollars.

9.

That the plaintiffs are without remedy in the premises except it be by the decree and process of this Court:

1. Vacating and setting aside said report, findings, conclusions, and order of said Interstate Commerce Commission in said proceedings, as being unlawful, unjust and beyond the jurisdiction of said Interstate Commerce Commission.

2. By granting the plaintiffs a decree forever enjoining and restraining the defendants, and each of them, from promulgating, publishing, demanding or collecting higher rates for the transportation of intrastate express freight within the State of South Dakota, than authorized by existing schedule or schedules and order of the Board of Railroad Commissioners of the State of South Dakota, except such proposed rates shall have been submitted to the Board of Railroad Commissioners of the State of South Dakota, and found by said Board to be reasonable and just rates for such transportation.

Wherefore, Plaintiffs pray that they be granted an interlocutory injunction, restraining and suspending the enforcement, operation and execution of the order of the Interstate Commerce Commission, entered on the 23d day of May, 1916, in the proceeding pending before said Commission wherein the Traffic Bureau of the Sioux City Commercial Club is plaintiff and the American Express Company, et al., are defendants, pending the final determination of this suit. Further restraining and enjoining the defendants, and each of them

pending the final determination of this suit, from promulgating, publishing, demanding, or collecting rates for the intrastate trans-
93 portation of express freight within the State of South Dakota, higher or greater than the rates for such transportation prescribed in the schedule, or schedules and order of the Board of Railroad Commissioners of the State of South Dakota which became effective on the 15th day of May, 1911.

Plaintiffs further pray that they be granted an order requiring the defendants to be and appear before this Honorable Court at such time and place as shall be designated by the Court, then and there to show cause, why the interlocutory injunction prayed for by the plaintiffs shall not be granted; that upon the final determination of this suit, the plaintiff be awarded a decree enjoining, setting aside and annulling the report, findings, conclusions and order entered by the Interstate Commerce Commission on May 23d, 1916, in the proceedings wherein the Traffic Bureau of the Sioux City Commercial Club was plaintiff and the American Express Company, et al., were defendants, adjudging and decreeing that the defendant Express Companies, and each of them, be enjoined and restrained from promulgating, publishing, demanding or collecting, or making effective, a schedule of rates for the intrastate transportation of express freight in the State of South Dakota, higher or greater than the rates for such intrastate transportation, as prescribed in the schedule or schedules and order of the Board of Railroad Commissioners made effective on May 15th, 1911, without such schedules of rates shall first be submitted to the Board of Railroad Commissioners, approved promulgated and authorized in conformity with the laws of the State of South Dakota in that behalf; that the plaintiffs pray for such other and further relief as they may be equitably entitled to, and that they be awarded their costs and disbursements in this proceeding.

Plaintiffs further pray that they be granted a writ of subpœna against the defendants, requiring the defendants and each of them, to answer this petition and the several matters therein set forth within the time prescribed by the rules of this Court.

THOMAS H. NULL,
EDWARD E. WAGNER.
Attorneys for Plaintiffs, Sioux Falls, S. D.

94 STATE OF SOUTH DAKOTA,
County of Minnehaha, ss:

Allen R. Fellows, being first duly sworn on oath deposes and says that he is Vice President and General Manager of Brown Drug Company, one of the plaintiffs in the above entitled action; that he has read the foregoing petition in equity, and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated upon information and belief, all of which he believes to be true.

ALLEN R. FELLOWS.

Subscribed and sworn to before me this 8th day of August, A. D., 1916.

[SEAL.] MARIE MONTGOMERY,
Notary Public within and for Minnehaha County, South Dakota.

95 EXHIBIT —.

In the District Court of the United States for the Northern District of the State of Iowa, Western Division.

BROWN DRUG COMPANY, FENN BROTHERS, JEWETT BROTHERS & Jewett, Sioux Falls Commercial Club of Sioux Falls, South Dakota; Mitchell Commercial Club of Mitchell, South Dakota; Watertown Commercial Club of Watertown, South Dakota; Aberdeen Commercial Club of Aberdeen, South Dakota, and Yankton Commercial Club of Yankton, South Dakota, Plaintiffs,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, American Express Company, and George C. Taylor, as President of said Company; Wells Fargo & Company, Adams Express Company, and W. M. Barrett, as President of said Company, and Great Northern Express Company and Sioux City Commercial Club of Sioux City, Iowa, Defendants.

Petition in Equity. No. —.

To the honorable the judges of said court:

The plaintiffs above named, being residents and citizens of the State of South Dakota, bring this petition to enjoin, set aside and annul the order of the Interstate Commerce Commission, hereinafter more specifically referred to, under and pursuant to Chapter 9 of the Judicial Code of the United States, and the provisions of the Act of Congress, approved October 22, 1913, (38 Stat. L.) and for cause of action against the defendants allege:

1.

That the Brown Drug Company, Fenn Brothers and Jewett Brothers & Jewett, are corporations, organized and existing under the laws of the State of South Dakota, each having its principal place of business at the City of Sioux Falls in said State; that each of said corporations is engaged in the business of manufacturing and selling at wholesale at the City of Sioux Falls, and as jobbers and
96 shippers of various goods, wares and merchandise, and selling and shipping its said commodities to retail dealers at various points on the various lines of railroad over and upon which the defendant Express Companies have been and are engaged in business in the State of South Dakota; that each of said corporations have

been engaged in such business for a great many years and has invested a large amount of capital in building up and establishing said business, and the volume of the business of each of said corporations amounts to many thousand dollars annually. That the Commercial Club of Sioux Falls, the Commercial Club of Mitchell, the Commercial Club of Watertown, the Commercial Club of Aberdeen and the Commercial Club of Yankton, plaintiffs above named are each incorporated under the laws of the State of South Dakota, each having its principal place of business at the city with which its name is associated and each being engaged in the business of promoting trade and commerce at the respective cities above named. That Wells-Fargo & Company is a corporation organized under the laws of Colorado, and the Great Northern Express Company is a corporation organized under the laws of the State of Minnesota, each of said corporations being a common carrier, engaged in the transportation of express freight within the State of South Dakota, and between the cities hereinbefore named or many of them and between the several states of the United States; that the American Express Company is a voluntary unincorporated association of individuals in the nature of a partnership, organized in the State of New York under the common law, having its principal place of business at the City of New York, and that George C. Taylor is the president thereof, and as such is duly authorized to sue and be sued for and on behalf of said American Express Company, and the several individuals composing the same; that Adams Express Company is a voluntary unincorporated association of individuals in the nature of a partnership, organized in the State of New York under the common law, having its principal place of business at the City of New York, and that W. M. Barrett is the president thereof, and as such is duly authorized to sue and be sued for and on behalf of said Adams Express Company and the persons composing the same; that the said American Ex-
97 press Company and Adams Express Company are common carriers of express freight, engaged in business as such within the State of South Dakota and between the cities above named in said State, and between the several states of the United States. That said Wells-Fargo & Company, Great Northern Express Company, American Express Company, James C. Fargo as president thereof, Adams Express Company and W. M. Barrett as president thereof, are hereinafter referred to and designated as Express Companies.

2.

That the city of Sioux City is situated in the State of Iowa, its corporate limits extending westward on the Big Sioux River, which stream forms a part of the boundary line between South Dakota, and Iowa; that Sioux City is a city of about sixty thousand population; that the city of Sioux Falls is a city situate in South Dakota, about ninety miles north of Sioux City and has a population of about twenty-five thousand; that the city of Yankton is situated in the State of South Dakota about fifty miles west of the City of Sioux City, and has about six thousand population; that the city of Mitchell is situate in the State of South Dakota, about one hundred twenty-five

miles northwest of the City of Sioux City and has a population of about ten thousand; that the City of Watertown is situate in the State of South Dakota, about one hundred ninety miles north of Sioux City and has a population of about ten thousand; that the City of Aberdeen is situate in the State of South Dakota, about two hundred fifty miles northwest of the City of Sioux City and has a population of about fifteen thousand; that in Sioux City, Iowa, Sioux Falls, South Dakota, Aberdeen, South Dakota, Watertown, South Dakota, Mitchell, South Dakota, and Yankton, South Dakota, are situated and located persons, firms and corporations engaged as jobbers and wholesalers of various kinds of merchandise, produce and supplies; that each of said cities are served by one or more of the defendant Express Companies and the several jobbers and wholesalers in said cities are dependent upon one or more of the defendant Express Companies for the transportation and distribution of their goods,
98 wares and merchandise by express in the territories contiguous to said cities; that said cities are so situated that the jobbers and wholesalers in the several cities are in competition with each other for the trade in the territory of the State of South Dakota.

3.

That heretofore and pursuant to the powers conferred upon the Board of Railroad Commissioners of the State of South Dakota, by the laws of South Dakota, and particularly by Chapter 159 of the Session Laws of 1909 and by Chapter 152 of the Session Laws of 1911, the said Board of Railroad Commissioners, on or about the 2nd day of May, 1911, did, by an order regularly and lawfully made and entered, prepare for each of the Express Companies doing business in said State at that time, a uniform schedule or schedules of reasonable maximum rates and charges for the transportation of express freight between the stations within the State of South Dakota, which rates did not exceed seventy per cent of the lowest rates which were in force for the transportation of express freight over any of the lines of railway between stations within the State of South Dakota on the first day of January 1909; that by said order said Board of Railroad Commissioners did specify that said schedule or schedules so prepared by said Board of Railroad Commissioners should be effective and in force on and after May 15th, 1911; that upon the promulgation of said schedule, schedules and order by said Board of Railroad Commissioners, the defendant Express Companies and others began a suit in the District Court of the United States, for the District of South Dakota, enjoining and restraining the enforcement of said schedule or schedules and order, on the ground that the rates prescribed therein were unreasonable and confiscatory; that an application was presented by said Express Companies to the said District Court of the United States for a temporary injunction restraining the enforcement of said schedule or schedules and order pending the suit; that upon a full hearing on said application for said temporary injunction the same was, on September 21st, 1911, in all things denied; that said suit has never been brought on for trial and is still pending and undetermined in said District Court of the United

States; that no appeal has been taken from said order of said
99 District Court denying the application for said temporary injunction; that upon the denial of said application for the temporary injunction by said District Court of the United States said Express Companies adopted and ever since have submitted to said schedule or schedules and order of said Board of Railroad Commissioners and are now carrying intrastate express freight in the State of South Dakota for the rates, tolls and charges specified and prescribed in said schedule or schedules and order.

4.

That the rates prescribed in said schedule or schedules and order of said Board of Railroad Commissioners of the State of South Dakota are just and reasonable rates for the transportation and carrying of express freight intrastate in the State of South Dakota; that by the laws of the State of South Dakota, said schedule or schedules and order of rates prescribed in said schedule or schedules and order are presumed as a matter of law to be reasonable and just rates for the transportation of express freight intrastate in the State of South Dakota.

5.

That prior to the promulgation of the schedule of rates for the interstate transportation of express freight by the Interstate Commerce Commission of the United States, as hereinafter related, the Express Companies operating throughout the States of Iowa, South Dakota and adjoining states, were operating and carrying interstate express freight upon and under schedules of rates for such transportation voluntarily adopted and promulgated by said Express Companies; that about the year 1912 in a proceeding before the Interstate Commerce Commission of the United States entitled, "In the Matter of Express Rates, Practices, Accounts and Revenue," the Interstate Commerce Commission adopted and promulgated certain schedules of rates to be applied by Express Companies to the interstate transportation of express freight throughout the United States; that the schedule or schedules so adopted and promulgated by the Interstate Commerce Commission applied to all interstate transportation
100 of express freight over and into the States of Iowa, South Dakota and adjoining states; that said schedules of rates for interstate transportation so adopted and promulgated by the Interstate Commerce Commission in many instances prescribed higher rates for the transportation of express freight from points in Iowa, and particularly from the City of Sioux City into the State of South Dakota, than had been prescribed in the schedules of rates theretofore voluntarily adopted and applied to such transportation by the Express Companies themselves; that thereafter and about July, 1915, in the same proceeding the Interstate Commerce Commission made an order modifying the rates for interstate transportation of express freight as prescribed in the schedules previously adopted and promulgated by said Commission, by which modification many of the rates for the interstate transportation of express freight from Sioux City,

Iowa into the State of South Dakota were increased and made higher than the rates prescribed in the first schedule adopted and promulgated by the said Interstate Commerce Commission; that said last above named schedule of rates was by the order of said Interstate Commerce Commission made effective and became effective September 1st, 1915.

6.

That about the year 1914, after the first schedule of rates for interstate transportation of interstate express freight had been adopted and promulgated by the Interstate Commerce Commission of the United States, a proceeding was instituted before the said Interstate Commerce Commission by the Traffic Bureau of the Sioux City Commercial Club against the Express Companies, which proceeding was entitled, "Traffic Bureau of the Sioux City Commercial Club, complainant, vs. American Express Company et al., defendants," and which proceeding received a docket number on the docket of the Interstate Commerce Commission of "Docket 7101." That in said proceeding it was alleged, among other things, by the complainant, that the rates prescribed by the Interstate Commerce Commission for the interstate transportation of express freight from Sioux City, Iowa to points in South Dakota were unreasonably high and were higher than the rates prescribed by the Railroad Commission of the
101 said State of South Dakota for the intrastate transportation of express freight for like distances; that by reason of the fact that the interstate rates were unreasonably high, the jobbers, wholesalers and manufacturers of Sioux City were unjustly discriminated against and that by reason of the lower intrastate rates prevailing in South Dakota, the jobbers and wholesalers in the State of South Dakota were enjoying an unjust advantage over jobbers and wholesalers situated in the City of Sioux City, Iowa, in the matter of the distribution of their goods, wares and merchandise in the territory of the State of South Dakota. That upon the initiation of said proceedings before said Interstate Commerce Commission and the filing of answers by the several defendants, a hearing was had before an Examiner appointed therefor by the Interstate Commerce Commission and testimony was submitted by the several parties to said proceedings; that at the said hearing the Sioux Falls Commercial Club, the Aberdeen Commercial Club, the Mitchell Commercial Club and the Railroad Commissioners of the State of South Dakota were permitted to intervene and be heard in said proceedings; that thereafter and about May 23, 1916, the Interstate Commerce Commission made its report, findings and conclusions in said proceedings; that said report, findings and conclusions are hereto annexed, marked "Exhibit "A," and made a part of this petition; that thereupon said Interstate Commerce Commission on said 23rd day of May, 1916, at its office in Washington, D. C. made and entered an order in words and figures as follows:

Order.

At a General Session of the Interstate Commerce Commission, Held at its Office in Washington, D. C., on the 23d Day of May, A. D. 1916.

No. 7101.

TRAFFIC BUREAU OF THE SIOUX CITY COMMERCIAL CLUB

v.

AMERICAN EXPRESS COMPANY and WELLS FARGO & COMPANY.

This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

102

It is ordered, that the above-named defendants, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before August 15, 1916, and thereafter to abstain, from publishing, demanding, or collecting higher rates for the transportation of shipments by express between Sioux City, Iowa, and points in the state of South Dakota, than are contemporaneously published, demanded, or collected for transportation under substantially similar circumstances and conditions for substantially equal distances between Sioux Falls, Mitchell, Aberdeen, Watertown, and Yankton, S. Dak., on the one hand, and said points in the State of South Dakota, on the other, which said relation of rates has been found by the Commission to be unjustly discriminatory.

And it is further ordered, that this order shall continue in force for a period of not less than two years from the date when it shall take effect.

By the Commission.

[SEAL.] GEORGE M. McGINTY, *Secretary.*"

That, the defendant Express Companies assume to interpret the said report, findings, conclusions and order of said Interstate Commerce Commission as having abrogated the schedule or schedule and order which was promulgated by the Board of Railroad Commissioners of the State of South Dakota, for the intrastate transportation of express freight within the State of South Dakota, and that the discrimination which they are ordered and directed to cease and desist is to be removed entirely by the promulgation and enforcement of a schedule of rates for intrastate shipments of express freight from said cities to other points within the State of South Dakota, equal to or higher than the schedule of rates prescribed by the Interstate Com-

merce Commission for interstate transportation of express freight in the States of Iowa and South Dakota, and that said defendant
103 Express Companies threaten to, and, unless enjoined and restrained by this Honorable Court from so doing, will, on September 15th, 1916, promulgate, publish and seek to make effective from said cities to other points in the State of South Dakota for the intrastate transportation of express freight in the State of South Dakota, a schedule of rates equal to or higher than the said schedule of rates prescribed by the Interstate Commerce Commission for the interstate transportation of express freight in the States of Iowa and South Dakota and will not make said proposed new schedule of rates applicable between other points of equal distance within said state of South Dakota.

That the imposition, publishing, demanding or collecting by the defendant Express Companies, on and after September 15th, 1916, of rates for the intrastate transportation of express freight from said cities within the State of South Dakota, equal to or higher than the interstate rates above referred to, will impose upon the plaintiffs and upon the shippers in said cities and of the State of South Dakota, a schedule of rates that will be unjust and unreasonable; in this, it will impose upon such shippers charges for such transportation that will be unreasonably high and excessive and that will be unjustly discriminative against the plaintiffs and other jobbers and shippers, doing business at and out of said cities, in favor of jobbers and shippers engaged in like business at other points on the lines of said Express Companies within the State of South Dakota, that by reason of such unjust and unreasonable exactions, the plaintiffs and other shippers in the State of South Dakota will suffer great and irreparable damage, and be greatly damaged in the transaction of their business in said State.

That under and by virtue of the laws of the State of South Dakota, the defendant Express Companies have no lawful right to promulgate, publish, demand or collect for the transportation of intrastate express freight in the State of South Dakota, a higher rate than the rates prescribed in schedules of rates adopted by the Board of Railroad Commissioners of said State; that as plaintiffs are
104 informed and believe the defendant Express Companies, pretend to assume that said report, findings, conclusions and order of the Interstate Commerce Commission, hereinbefore referred to, relieve the said defendant Express Companies, from the necessity of submitting their proposed schedule of rates which they intend to publish and make effective, on or about September 15, 1916, to the Board of Railroad Commissioners of the State of South Dakota for their judgment as to the reasonableness of said rates and for their adoption and approval by said Board of Railroad Commissioners.

That by the wrongful and unlawful acts about to be committed by the defendant Express Companies, in promulgating and making effective such proposed schedules of rates for the intrastate transportation of express freight within the State of South Dakota, without the determination of their reasonableness by the Board of Railroad Commissioners and without the approval and sanction of such

Board of Railroad Commissioners of the State of South Dakota, the plaintiffs herein, as well as other shippers of the State of South Dakota, will be deprived of any remedy to protect themselves against the unreasonable charges for such intrastate transportation of express freight, except by independent suits to collect overcharges resulting from such unjust and unreasonable rates by reason whereof, plaintiffs and shippers in the State of South Dakota will become involved in a great multiplicity of suits.

7.

Plaintiffs further allege that the report, findings, conclusions and order of the Interstate Commerce Commission, entered May 23d, 1916, in said proceedings in which the Traffic Bureau of the Sioux City Commercial Club was plaintiff and the American Express Company, et al., were defendants, was and is wrongful and unlawful, in this; that the said Interstate Commerce Commission was without jurisdiction to pass upon and determine the question of the reasonableness of the schedule of rates prescribed by the Board of Railroad Commissioners of the State of South Dakota for intrastate transportation of express freight within the State of South Dakota; that in said proceedings there was no legal or competent evidence
105 produced before said Examiner or submitted to said Interstate Commerce Commission tending to establish the reasonableness or unreasonableness of said schedule of rates prescribed by said Board of Railroad Commissioners of the State of South Dakota, for the intrastate transportation of express freight within the State of South Dakota; that the findings, conclusions and order of the Interstate Commerce Commission that said intrastate rates within the State of South Dakota were unreasonably low, was and is without any legal or competent testimony in support thereof; that in the issues presented by the pleadings in said proceedings, no issue of fact or law was presented to said Interstate Commerce Commission relative to the reasonable- or unreasonableness of said intrastate rates for the transportation of express freight within the State of South Dakota; that there was no legal or competent evidence submitted in said proceedings before said Examiner or to said Interstate Commerce Commission tending to show the reasonableness or unreasonableness of the interstate rates for the transportation of express freight from the City of Sioux City, Iowa, into the State of South Dakota, and that the findings, conclusions and order of the Interstate Commerce Commission that the interstate rate, as applied to shipments of express freight from Sioux City, Iowa, to South Dakota points, was a reasonable and just rate, was and is without any legal or competent evidence in support thereof.

That the order of the Interstate Commerce Commission in said proceeding, directing and commanding that the Express Companies cease and desist, on or before August 15th, 1916, and thereafter to abstain, from publishing, demanding or collecting higher rates for the transportation of shipments of express from Sioux City, Iowa, and points in the State of South Dakota, than are contemporane-

ouly published, demanded or collected for transportation under substantially similar circumstances and conditions for substantially equal distances between Sioux Falls, Mitchell, Aberdeen, Watertown, and Yankton, South Dakota, on the one hand, and said points in the State of South Dakota, on the other, is beyond the jurisdiction and lawful powers of said Interstate Commerce Commission, in
106 this; that under the laws of the United States and under the laws of the State of South Dakota, said Express Companies are without authority of law, and by said statutes are deprived of the power, to make and promulgate and establish schedules of rates for the transportaion of express freight either interstate or intrastate without such schedule of rates having first been found to be reasonable and approved,—the interstate rates by the Interstate Commerce Commission and the intrastate rates by the Board of Railroad Commissioners of the State of South Dakota,—and that the Interstate Commission Commission was without authority of law to delegate or submit to the defendant, Express Companies, the right and power to name rates for the purpose of relieving the Sioux City jobbers and shippers from the alleged discrimination without any finding by either the Interstate Commerce Commission or the Board of Railroad Commissioners of the State of South Dakota, that the rates so to be promulgated and made effective are reasonable and just rates.

That said report, findings, conclusions and order of the Interstate Commerce Commission was without authority of law in this; that the damage which the jobbers, wholesalers and shippers of South Dakota will suffer from the increased rates will exceed many fold the damage claimed or pretended to be suffered by the jobbers and wholesalers of Sioux City under existing conditions; that it will be a wrongful and unjust imposition, and a broad and irreparable damage upon the jobbers, wholesalers and shippers of South Dakota for the relief and benefit of the few shippers and wholesalers of Sioux City, Iowa; that the said Interstate Commerce Commission in its said report findings, conclusions and order did not take into consideration and entirely omitted to consider the great and irreparable injury which the jobbers, wholesalers and shippers of South Dakota would suffer as compared with the amount of damage which the few jobbers and wholesalers of Sioux City claim and pretend to be suffering under the alleged discriminations.

That the results of the imposition of such exactions under the unreasonably high rates for the intrastate transportation of express freight within the State of South Dakota, upon the plaintiffs
107 and other jobbers, wholesalers and shippers in said State of South Dakota, will deprive the plaintiffs and such jobbers, wholesalers and shippers within the State of South Dakota, of their property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States.

8.

That the amount involved in this suit, exclusive of interest and costs is largely in excess of the sum of Three thousand dollars.

9.

That the plaintiffs are without remedy in the premises except it be by the decree and process of this Court:

1. Vacating and setting aside said report, findings, conclusions, and order of said Interstate Commerce Commission in said proceedings, as being unlawful, unjust and beyond the jurisdiction of said Interstate Commerce Commission.

2. By granting the plaintiffs a decree forever enjoining and restraining the defendants, and each of them, from promulgating, publishing, demanding or collecting higher rates for the transportation of intrastate express freight within the State of South Dakota, than authorized by existing schedule or schedules and order of the Board of Railroad Commissioners of the State of South Dakota, except such proposed rates shall have been submitted to the Board of Railroad Commissioners of the State of South Dakota, and found by said Board to be reasonable and just rates for such transportation.

Wherefore, Plaintiffs pray that they be granted an interlocutory injunction, restraining and suspending the enforcement, operation and execution of the order of the Interstate Commerce Commission, entered on the 23d day of May, 1916, in the proceeding pending before said Commission wherein the Traffic Bureau of the Sioux City Commercial Club is plaintiff and the American Express Company, et al., are defendants, pending the final determination of this suit. Further restraining and enjoining the defendants, and each of them pending the final determination of this suit, from promulgating, publishing, demanding, or collecting rates for the intrastate
108 transportation of express freight within the State of South Dakota, higher or greater than the rates for such transportation prescribed in the schedule, or schedules and order of the Board of Railroad Commissioners of the State of South Dakota which became effective on the 15th day of May, 1911.

Plaintiffs further pray that they be granted an order requiring the defendants to be and appear before this Honorable Court at such time and place as shall be designated by the Court, then and there to show cause, why the interlocutory injunction prayed for by the plaintiffs shall not be granted; that upon the final determination of this suit, the plaintiff be awarded a decree enjoining, setting aside and annulling the report, findings, conclusions and order entered by the Interstate Commerce Commission on May 23d, 1916, in the proceedings wherein the Traffic Bureau of the Sioux City Commercial Club was plaintiff and the American Express Company, et al., were defendants, adjudging and decreeing that the defendant Express Companies, and each of them, be enjoined and restrained from promulgating, publishing, demanding or collecting, or making effective, a schedule of rates for the intrastate transportation of express freight in the State of South Dakota, higher or greater than the rates for such intrastate transportation, as prescribed in the schedule or schedules and order of the Board of Railroad Commissioners made effective on May 15th, 1911, without such schedules

of rates shall first be submitted to the Board of Railroad Commissioners, approved promulgated and authorized in conformity with the laws of the State of South Dakota in that behalf; that the plaintiffs pray for such other and further relief as they may be equitably entitled to, and that they be awarded their costs and disbursements in this proceedings.

Plaintiffs further pray that they be granted a writ of subpœna against the defendants, requiring the defendants and each of them, to answer this petition and the several matters therein set forth within the time prescribed by the rules of this Court.

THOMAS H. NULL,
EDWARD E. WAGNER,
Attorneys for Plaintiffs, Sioux Falls, S. D.

109 STATE OF SOUTH DAKOTA,
County of Minnehaha, ss:

Allen R. Fellows, being first duly sworn on oath deposes and says that he is Vice President and General Manager of Brown Drug Company, one of the plaintiffs in the above entitled action; that he has read the foregoing petition in equity, and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated upon information and belief, all of which he believes to be true.

ALLEN R. FELLOWS.

Subscribed and sworn to before me this 8th day of August, A. D. 1916.

[SEAL.] MARIE MONTGOMERY,
Notary Public within and for Minnehaha County, South Dakota.

110 EXHIBIT J.

In the District Court of the United States for Northern District of Iowa, Western Division.

In Equity. No. 46.

BROWN DRUG COMPANY et als., Plaintiffs,

vs.

UNITED STATES OF AMERICA et als., Defendants.

Order.

This cause came on for hearing this 8th day of September 1916 before the Hon. Walter I. Smith, United States Circuit Judge Eighth Circuit, the Hon. Henry T. Reed, District Judge Northern District of Iowa, and the Hon. Martin J. Wade, District Judge Southern District of Iowa, on the rule to show cause issued August 28, 1916.

And thereupon come the United States by its counsel and the Interstate Commerce Commission by its counsel, both and each appearing specially for the purpose and for no other purpose, and object to the court proceeding with any hearing on said rule to show cause or any other hearing in said cause for want of jurisdiction, because it does not appear that copies of the petition were left at the office of the Attorney General or at the office of the Secretary of Interstate Commerce Commission five days before this hearing, and the same was submitted and taken under advisement and thereupon the plaintiffs with leave of court offer their evidence in support of the application for a temporary writ of injunction and the court finds that upon the showing made the plaintiffs would not be entitled to a temporary writ of injunction and therefore declines to pass upon the plea to the jurisdiction filed by the United States and the Interstate Commerce Commission but denies the application for a temporary writ of injunction, and the Government of the United States, and the Interstate Commerce Commission except to the failure to pass upon the plea to the jurisdiction and the petitioners jointly and severally excepted to the refusal to grant a temporary writ of injunction.

WALTER I. SMITH,
U. S. Circuit Judge.
MARTIN J. WADE,
U. S. District Judge.
HENRY T. REED,
U. S. District Judge, Dissenting.

111 [Endorsed:] In the Supreme Court of the State of South Dakota. State of South Dakota ex rel. Clarence C. Caldwell et al., Plaintiffs, vs. American Express Company et al., Defendants. Answer. Bailey & Voorhees, Attorneys for Defendants, Sioux Falls, S. D.

112 In the Supreme Court of the State of South Dakota, October Term, 1916.

STATE OF SOUTH DAKOTA ex Rel. CLARENCE C. CALDWELL, as Attorney General of the State of South Dakota, and John J. Murphy, P. W. Dougherty, and William G. Smith, as and Constituting the Board of Railroad Commissioners of the State of South Dakota, Plaintiffs,

vs.

AMERICAN EXPRESS COMPANY and GEORGE C. TAYLOR, Individually and as President of the American Express Company, and Wells Fargo & Company, Defendants.

Demurrer.

The plaintiffs demur to the answer of the defendant filed in this cause as their answer to the complaint and return to the order to

show cause herein, upon the ground that the answer does not state facts sufficient to constitute a defense in this suit.

Wherefore, plaintiffs pray judgment as demanded in the complaint.

Dated this 2nd day of October, 1916.

CLARENCE C. CALDWELL,
BYRON S. PAYNE,
P. W. DOUGHERTY,
OLIVER E. SWEET,
Attorneys for Plaintiffs.

Due and personal service by copy of the foregoing demurrer is hereby admitted at Pierre, South Dakota, this 2nd day of October, 1916, and it is agreed that the defendants waive notice of trial upon this demurrer, and consent that the same may be heard to the court on this day.

T. B. HARRISON,
BRANCH P. KERFOOT,
C. O. BAILEY,
Attorneys for Defendants.

113 In the Supreme Court of the State of South Dakota.

STATE OF SOUTH DAKOTA ex Rel. CLARENCE C. CALDWELL, as Attorney General of the State of South Dakota, and John T. Murphy, P. W. Dougherty, and William G. Smith, as and Constituting the Board of Railroad Commissioners of the State of South Dakota, Plaintiffs,

vs.

AMERICAN EXPRESS COMPANY and GEORGE C. TAYLOR, Individually and as President of the American Express Company, and Wells Fargo & Company, a Corporation, Defendants.

Stipulation.

It is hereby agreed between the parties hereto that the motion for a temporary injunction be considered a motion for a permanent injunction and the case be submitted on the pleadings and exhibits for final judgment with leave to either party to file typewritten or printed briefs on or before November 1st, 1916.

CLARENCE C. CALDWELL,
OLIVER E. SWEET,
Attorneys for Plaintiff.
T. B. HARRISON,
BRANCH P. KERFOOT, AND
C. O. BAILEY,
Attorneys for Defendants.

114 In the Supreme Court, State of South Dakota.

STATE OF SOUTH DAKOTA ex Rel. CLARENCE C. CALDWELL, as Attorney General of the State of South Dakota, and John J. Murphy, P. W. Dougherty, and William G. Smith, as and Constituting the Board of Railroad Commissioners of the State of South Dakota, Plaintiffs,

vs.

AMERICAN EXPRESS COMPANY and GEORGE C. TAYLOR, Individually and as President of the American Express Company, and Wells Fargo & Company, Defendants.

Motion.

Now come the defendants and show to the Court that the Interstate Commerce Commission in the case of the Traffic Bureau of the Sioux City Commercial Club v. American Express Company et al., did heretofore order the defendants to put into effect certain rates for transportation by express between Sioux Falls, Mitchell, Aberdeen, Watertown and Yankton, South Dakota and other South Dakota points, and that by the order entered herein upon the defendants to show cause why an injunction be not issued against the putting into effect of the rates ordered by the Interstate Commerce Commission, the defendants were temporarily restrained from putting said rates into effect, pending the determination of said order to show cause.

Defendants further show that by said order of the Interstate Commerce Commission they were ordered to put into effect the rates restrained by the order of this Court and to make the same effective on or before September 15, 1916; but that by reason of said temporary restraining order they have been unable to comply with the order of the Interstate Commerce Commission.

Defendants further show that the Department of Justice of the United States has now instituted suits against the defendants in the

115 District Court of the United States for the southern district of New York to recover from the defendants the penalties prescribed by the statutes of the United States, to-wit, $5,000 per day for failure to comply with the order as aforesaid of the Interstate Commerce Commission, and that defendants are liable to further suits for the recovery of further penalties for each and every day they fail to comply with said order of the Interstate Commerce Commission.

Wherefore defendants pray that the temporary restraining order heretofore issued by this Court be vacated and set aside, and that defendants be permitted to put into effect the rates prescribed by the Interstate Commerce Commission, and to maintain the same in effect until the final determination of this action. Defendants do hereby offer, if said temporary restraining order be vacated as above prayed, to keep strict account of all transactions had under the rates

prescribed by the Interstate Commerce Commission to and from Sioux Falls, Watertown, Aberdeen, Mitchell and Yankton, and other South Dakota points and if it be finally determined that the rates prescribed by the Interstate Commerce Commission are illegal or should not have been put into effect, that defendants will refund the excess charges collected by them under said rates to all shippers having transactions with the defendants while said rates shall remain in effect. Defendants hereby consent that said temporary restraining order be dissolved upon the condition that defendants do so keep accounts of the express transactions had by them and do so make refunds to the shippers by express.

Dated at Pierre, South Dakota, December 5, 1916.

T. B. HARRISON,
BRANCH P. KERFOOT, AND
BAILEY & VOORHEES,
Attorneys for Defendants.

Personal service by copy of the foregoing notice is hereby admitted at Pierre, S. D., this 5th day of Dec., 1916.

OLIVER E. SWEET,
Ass't Att'y General, Att'y for Complainants.

116 In the Supreme Court of the State of South Dakota, October Term, 1916.

STATE OF SOUTH DAKOTA ex Rel. CLARENCE C. CALDWELL, as Attorney General of the State of South Dakota, and John J. Murphy, P. W. Dougherty, and William G. Smith, as and Constituting the Board of Railroad Commissioners of the State of South Dakota, Plaintiffs,

vs.

AMERICAN EXPRESS COMPANY and GEORGE C. TAYLOR, Individually and as President of the American Express Company, and Wells Fargo & Company, Defendants.

Order.

The above entitled suit coming on for hearing upon the motion of the defendants filed December 5th, 1916, to vacate the temporary restraining order heretofore made herein, and Mr. C. O. Bailey appearing for the defendants in support of said motion and Mr. Oliver E. Sweet and Mr. Byron S. Payne appearing for the plaintiffs in opposition thereto, and the court having considered said motion

It is hereby ordered, that the same be and is hereby denied.

Dated at Pierre, South Dakota, December 5th, 1916.

By the Court.

S. C. POLLEY,
Presiding Judge.

Attest:

[SEAL.] E. F. SWARTZ,
Clerk of the Supreme Court.

To the foregoing order at the time of the entry thereof the defendants excepted which exception is allowed.

S. C. POLLEY,
Presiding Judge.

117 In the Supreme Court of the State of South Dakota, October Term, 1916.

STATE OF SOUTH DAKOTA ex Rel. CLARENCE C. CALDWELL, as Attorney General of the State of South Dakota, and John J. Murphy, P. W. Dougherty, and William G. Smith, as and Constituting the Board of Railroad Commissioners of the State of South Dakota, Plaintiffs.

vs.

AMERICAN EXPRESS COMPANY and GEORGE C. TAYLOR, Individually and as President of the American Express Company and Wells Fargo and Company, Defendants.

Order.

The plaintiffs having demurred to the answer of the defendants and said demurrer coming on for argument, and the court having heard the arguments of counsel and being fully advised in the premises;

On Motion of Clarence C. Caldwell, P. W. Dougherty, Byron S. Payne and Oliver E. Sweet, Attorneys for plaintiffs, it is ordered, that the demurrer of the plaintiffs to the answer of the defendants herein be and the same is hereby in all things sustained.

Dated at Pierre, S. D., this 5th day of December, 191[illegible]

By the Court.

S. C. [illegible]
Presiding Judge.

Attest:
[SEAL.] E. F. SWARTZ, *Clerk.*

To the rendering and entering of said order the defendants at the time duly excepted and their exception is allowed.

S. C. POLLEY,
Presiding Judge.

Due and personal service of the foregoing order by copy is hereby admitted at Pierre, South Dakota, this 5th day of December, 1916, and the defendants hereby elect to stand upon their answer and hereby waive notice of application for judgment as demanded in the complaint.

T. B. HARRISON,
BRANCH P. KERFOOT, AND
C. O. BAILEY,
Attorneys for Defendants.

118 In the Supreme Court of the State of South Dakota, October Term, 1916.

STATE OF SOUTH DAKOTA ex Rel. CLARENCE C. CALDWELL, as Attorney General of the State of South Dakota, and John J. Murphy, P. W. Dougherty, and William G. Smith, as and Constituting the Board of Railroad Commissioners of the State of South Dakota, Plaintiffs,

vs.

AMERICAN EXPRESS COMPANY and GEORGE C. TAYLOR, Individually and as President of the American Express Company, and Wells Fargo and Company, Defendants.

Judgment.

The above entitled suit having been regularly brought on for hearing at the October, 1916, term of the court upon the order heretofore made herein upon the defendants to show cause why temporary injunction be not issued as prayed in the complaint herein, and upon the demurrer to the answer, and the plaintiffs, appearing by Mr. Oliver E. Sweet, Mr. P. W. Dougherty, Mr. Clarence C. Caldwell and Mr. Byron S. Payne and the defendants appearing by Mr. T. B. Harrison, Mr. Branch P. Kerfoot and Mr. C. O. Bailey, and it having been stipulated that the court shall decide this suit upon the pleadings and exhibits filed herein, and the court having made and entered its order sustaining the demurrer of the plaintiffs to the answer of the defendants, which is on file herein, and the defendants having elected in open court to stand on their answer, and it appearing to the court that the facts set forth in the answer herein and in the exhibits thereto attached do not constitute any defense of the cause of action set forth in the complaint and that notwithstanding the facts set forth in the answer the plaintiffs are entitled to the relief demanded in their complaint and to a final judgment and permanent injunction herein.

It is hereby on motion of Mr. Oliver E. Sweet, Mr. P. W. Dough-
erty, Mr. Clarence C. Caldwell and Mr. Byron S. Payne, at-
119 torneys for the plaintiffs as aforesaid, ordered, adjudged and decreed, that the defendants, the American Express Company and George C. Taylor individually and as president of the American Express Company and Wells Fargo and Company and each of them and their agents, servants, attorneys, employees, representatives and all persons acting for or on behalf of them or either of them be and each of them is hereby permanently enjoined and restrained from putting into effect the tariffs, tables, classifications, Rules, regulations or practices presented by such express companies to the railroad commission of the state of South Dakota on the 25th day of August, 1916, or any of the rates, fares or charges specified in said tables between the cities of Aberdeen, Mitchell, Sioux Falls, Watertown and Yankton in the state of South Dakota and other stations of the said

express companies in said state and enjoined and restrained from putting into effect or applying on intrastate transportation of property by express between any points in the state of South Dakota rates, fares, charges, classifications, rules, regulations or practices that will result in rates, fares and charges greater or higher than the maximum rates or charges for the transportation of express freight between stations within the state of South Dakota over lines of railway wholly within said state specified and contained in the order made and entered by the board of railroad commissioners of said state pursuant to the provisions of Chapter 152 of the Session Laws of 1911 on the second day of May, 1911, and known as South Dakota Express Distance Tariff No. 2, or in the schedule or schedules contained in the said order unless or until a schedule of express rates shall have first been submitted to the board of railroad commissioners of the state of South Dakota and have been regularly approved and allowed by said board in conformity to the laws of the state of South Dakota.

It is further ordered, adjudged and decreed that the plaintiffs have and recover their costs and disbursements herein taxed and allowed in the sum of — dollars (the amount thereof to be inserted by the clerk herein after the same shall have been taxed.

120 Done in open court at Pierre in the state of South Dakota, this 6th day of December, 1916.

By the Court:

S. C. POLLEY,
Presiding Judge.

Attest:
[SEAL.] E. F. SWARTZ,
Clerk of the Supreme Court.

To the entry of the foregoing judgment the defendants duly accepted, which acception is allowed.

S. C. POLLEY,
Presiding Judge.

Due and personal service of the foregoing judgment and injunction is admitted at Pierre, South Dakota, this 6th day of December, 1916.

T. B. HARRISON,
BRANCH P. KERFOOT AND
C. O. BAILEY,
Attorneys for Defendants.

121 In the Supreme Court of the State of South Dakota. October Term, 1916.

STATE OF SOUTH DAKOTA ex Rel. CLARENCE C. CALDWELL, as Attorney General of the State of South Dakota, and John J. Murphy, P. W. Dougherty, and William G. Smith, as and Constituting the Board of Railroad Commissioners of the State of South Dakota, Plaintiffs,

vs.

AMERICAN EXPRESS COMPANY and GEORGE C. TAYLOR, Individually and as President of the American Express Company, and Wells Fargo & Company, Defendants.

Petition for Writ of Error.

Now come the above named defendants, American Express Company, and George C. Taylor, individually and as President of the American Express Company, and Wells Fargo & Company, and respectfully show that in the above entitled suit, on the 6th day of December, 1916, a final judgment was rendered against your petitioners by the Supreme Court of the state of South Dakota, said court being the highest court of the state of South Dakota in which a decision in said suit could be had.

Your petitioners further show that said suit is an original action instituted in the said Supreme Court of the state of South Dakota by the state of South Dakota, ex rel. Clarence C. Caldwell, as Attorney General of the state of South Dakota, and John J. Murphy, P. W. Dougherty and William G. Smith, as and constituting the Board of Railroad Commissioners of the state of South Dakota, as plaintiffs, vs. your petitioners, the American Express Company, and George C. Taylor, individually and as President of the Ameri-

122 can Express Company, and Wells Fargo & Company, as defendants; that the relief prayed by the plaintiffs in said suit was that the defendants be permanently enjoined and restrained from putting into effect certain express tariffs, tables, classifications, rules and regulations issued on behalf of the defendants on August 15, 1916, to become effective September 15, 1916, and regulating intrastate express business in the state of South Dakota, and that the defendants be permanently enjoined and restrained from putting into effect or applying on intrastate transportation of property by express between any points in the state of South Dakota rates, fares, charges, classifications, rules, regulations or practices that will result in rates, fares and charges greater or higher than the maximum rates or charges for the transportation of express freight between stations within the state of South Dakota over lines of railway wholly within said state of South Dakota, specified and contained in an order made and entered by the Board of Railroad Commissioners of the state of South Dakota on the 2nd day of May, 1911, or in the schedule or schedules contained in said order, (which said order is known as South Dakota Express Distance Tariff No. 1) unless or until a

schedule of express rates shall have first been submitted to the Board of Railroad Commissioners of South Dakota, and been regularly approved and allowed by said Board in conformity to the laws of the state of South Dakota.

Your petitioners further show that by the answer filed by your petitioners to the complaint of the plaintiffs in said suit, it appeared that the Interstate Commerce Commission did, upon the 23rd day of May, 1916, in an action then regularly pending before it, make an order requiring your petitioners, the American Express Company and Wells Fargo & Company, to cease and desist, on or before August 15, 1916, and thereafter to abstain from publishing or collecting higher rates for the transportation of shipments by express between Sioux City, Iowa, and points in the state of South Dakota, than are contemporaneously published, demanded or collected for
123 transportation under substantially similar circumstances and conditions, for substantially equal distances, between Sioux Falls, Mitchell, Aberdeen, Watertown and Yankton, South Dakota, on the one hand, and said points in the state of South Dakota on the other, which relation of express rates has been found by the Interstate Commerce Commission to be unjustly discriminatory; that subsequently said order was, by the Interstate Commerce Commission, made effective September 15, 1916, instead of August 15, 1916, and that it was ordered by the said Interstate Commerce Commission that said order should continue in force for a period of not less than two years from the date when it shall take effect.

Your petitioners further show that by their answer, filed in this suit, it appeared that the rates which the said American Express Company and Wells Fargo & Company were required, by the said order of the Interstate Commerce Commission, to put into effect between Aberdeen, Sioux Falls, Mitchell, Watertown and Yankton and other South Dakota points were, in some instances, higher than the rates prescribed by the Railroad Commission of the state of South Dakota in its order of May 2, 1911, known as South Dakota Express Distance Tariff No. 2, and that the only changes which the said express companies were attempting to make in the rates prescribed by said South Dakota Express Distance Tariff No. 2, by the tariffs issued on behalf of said express companies on August 15, 1916, to become effective September 15, 1916, were the changes required to make compliance with the said order of the Interstate Commerce Commission.

Your petitioners further show that this suit is a suit brought to enjoin the compliance by your petitioners with an order of the Interstate Commerce Commission, duly and regularly made by said Commission; that in their answer to the complaint in said suit your petitioners set forth that the Supreme Court of the state of South Dakota did not possess the jurisdiction to entertain a suit to enjoin or suspend an order of the Interstate Commerce Commission;
124 that your petitioners also set forth in their answer in said suit that said order of the Interstate Commerce Commission was a proper exercise of the authority conferred upon the Interstate Commerce Commission under the Act to Regulate Commerce, approved February 4, 1887.

Your petitioners further show that in its final decision in said suit, the Supreme Court of the state of South Dakota held that it possesses jurisdiction to entertain this suit; that by said decision there was drawn in question the validity of the provisions of the act of Congress entitled "An Act to Codify, Refise and Amend the Laws Relating to the Judiciary," approved March 3, 1911, and the validity of an act of Congress entitled "An Act Making Appropriations to Supply Urgent Deficiencies for the Fiscal Year 1913, and for Other Purposes," approved October 22, 1913, which said statutes conferred upon the District Courts of the United States exclusive jurisdiction of cases brought to enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission; that the decision of the state Supreme Court was against the validity of said statutes.

Your petitioners further show that said order of the Interstate Commerce Commission, made as aforesaid upon the 23rd day of May, 1916, was an order made by the Interstate Commerce Commission pursuant to the authority vested in said Interstate Commerce Commission under and by virtue of the act of Congress entitled "An Act to Regulate Commerce," approved February 4, 1887; that in this suit there was drawn in question the validity of such authority exercised under said act to regulate commerce and the validity of said act, and that the decision of the Supreme Court of the state of South Dakota was against the validity of the action of the Interstate Commerce Commission in making said order, and against the validity of said act to regulate commerce, insofar as said act was claimed to authorize the making of said order; that the Supreme Court of the state of South Dakota, in its decision in
125 said suit, held that the action of the Interstate Commerce Commission in making said order was illegal and unconstitutional, and that the same was not authorized by the provisions of said act to regulate commerce; that all of said matters will more fully appear from the assignment of errors which is filed with this petition.

Wherefore your petitioners pray that a writ of error from the Supreme Court of the United States may issue in this behalf to the Supreme Court of the state of South Dakota for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in this case, duly authenticated, may be sent to the Supreme Court of the United States, and that the judgment and decision herein be reversed.

Dated this 9th day of December, 1916.

AMERICAN EXPRESS COMPANY,
GEORGE C. TAYLOR,
Individually and as President of the American Express Company, and
WELLS FARGO & COMPANY,
Petitioners.

By T. B. HARRISON,
BRANCH P. KERFOOT, AND
C. O. BAILEY, *Their Attorneys.*

126 [Endorsed:] 4106. (13) In the Supreme Court of the State of South Dakota. State of South Dakota, ex rel. Clarence C. Caldwell, as Attorney General, et al., Plaintiffs, vs. American Express Company, et al., Defendants. Petition for Writ of Error. Supreme Court, State of South Dakota. Filed Dec. 11, 1916. E. F. Swartz, Clerk. —— ——, Attorney for —— ——. Supreme Court, State of South Dakota. Filed Dec. 14, 1916. E. F. Swartz, Clerk. Bailey & Voorhees, Attorneys for Defendants, Sioux Falls, S. D.

127 In the Supreme Court of the State of South Dakota.

October Term, 1916.

STATE OF SOUTH DAKOTA ex Rel. CLARENCE C. CALDWELL, as Attorney General of the State of South Dakota, and John J. Murphy, P. W. Dougherty, and William G. Smith, as and Constituting the Board of Railroad Commissioners of the State of South Dakota, Plaintiffs.

vs.

AMERICAN EXPRESS COMPANY and GEORGE C. TAYLOR, Individually and as President of the American Express Company, and Wells Fargo & Company, Defendants.

Assignment of Errors.

Now come the above named defendants, American Express Company, George C. Taylor, individually and as President of the American Express Company, and Wells, Fargo & Company, and respectfully show that in the record, proceedings, decision and final judgment of the Supreme Court of the state of South Dakota in the above entitled suit, there is manifest error in this, to-wit:

First.

The court erred in sustaining the demurrer of the plaintiffs to the answer of the defendants.

Second.

The court erred in denying the motion of the defendants to vacate the temporary restraining order, made by the court herein in the order upon the defendants to show cause why an interlocutory injunction be not issued, as prayed in the complaint herein.

Third.

The court erred in entering judgment in favor of the plain-
128 tiffs and against defendants.

Fourth.

The court erred in holding that it possesses jurisdiction over the subject matter of this suit and to hear and determine this suit.

Fifth.

The court erred in holding that it possesses any jurisdiction to enjoin, set aside, annul or suspend, in whole or in part, an order of the Interstate Commerce Commission.

Sixth.

The court erred in not holding that the Interstate Commerce Commission possesses authority to make the order made by the Interstate Commerce Commission under date of May 23, 1916, in the case of the Traffic Bureau of the Sioux City Commercial Club vs. the American Express Company and Wells Fargo & Company, set up as Exhibit "C" to the answer to the complaint herein.

Seventh.

The court erred in holding that the defendants, American Express Company and Wells Fargo & Company, were not required, by the order of the Interstate Commerce Commission of May 23, 1916, Exhibit "C" to the answer to the complaint herein, to put into effect the Interstate Commerce Commission rates for transportation by express between Sioux Falls, Mitchell, Aberdeen, Watertown and Yankton, South Dakota, on the one hand, and points in the state of South Dakota on the other.

Eighth.

The court erred in holding that the Interstate Commerce Commission possesses no authority to regulate or control interstate rates in cases in which said rates disturb the relation of interstate rates duly promulgated or approved by the Interstate Commerce Commission.

Ninth.

The court erred in holding that in cases in which the interstate rates for transportation by express have been established by the Interstate Commerce Commission and intrastate rates for transportation by express established by authority of a state disturb
129 the relation of such interstate rates and effect discriminations, that the intrastate rates should not be modified so as to conform to the interstate rates and do away with the discrimination.

Tenth.

The court erred in holding that intrastate rates established by the state authority can be maintained when such intrastate rates disturb the relation of interstate rates duly established by the Interstate Commerce Commission for transportation of express.

Eleventh.

The court erred in holding that the defendants, the American Express Company and Wells Fargo & Company, before putting into

effect schedules of rates affecting intrastate rates for transportation by express in the state of South Dakota, must comply with the provisions of the laws of the state of South Dakota respecting the filing of such schedules or rates with the Board of Railroad Commis-ioners of the state of South Dakota, and obtaining the consent of said Board of Railroad Commissioners to the putting into effect of such schedules of rates.

Twelfth.

The court erred in holding that the defendants, the American Express Company and Wells Fargo & Company, in complying with the order of the Interstate Commerce Commission of May 23, 1916, Exhibit "C" to the answer to the complaint in this suit, was obliged to comply with any provisions of the laws of the state of South Dakota respecting the establishment of intrastate rates for transportation by express, or respecting the making or filing of schedules of such rates.

Thirteenth.

The court erred in not holding that the power of Congress to regulate interstate commerce extends to the regulation of intrastate commerce when such intrastate commerce interferes in any manner with the conduct of interstate commerce.

130 Fourteenth.

The court erred in not holding that when the Interstate Commerce Commission has established rates for transportation by express, such action upon the part of the Interstate Commerce Commission is tantamount to action by Congress, and that such action, with respect to all matters of interstate commerce, and with respect to all matters of intrastate commerce which affect interstate commerce, is exclusive of all right of control over such commerce by state authority.

Fifteenth.

The court erred in not holding that the order of the Interstate Commerce Commission of May 23, 1916, Exhibit "C" to the answer to the complaint herein, was not made by the Interstate Commerce Commission by virtue of authority exercised by it under the provisions of the act to regulate commerce, approved February 4, 1887, and of the acts amendatory thereof.

Sixteenth.

The court erred in holding that the act to regulate commerce, approved February 4, 1887, and the acts amendatory thereof, do not extend to the control of intrastate commerce when such commerce hinders or disturbs interstate commerce.

Seventeenth.

The court erred in holding that the act to regulate commerce, approved February 4, 1887, is unconstitutional so far as the same affects intrastate commerce.

Wherefore said defendants pray that the judgment and decision of the Supreme Court of the state of South Dakota in this suit may be reversed.

Dated December 9, 1916.

T. B. HARRISON,
BRANCH P. KERFOOT, AND
C. O. BAILEY,
Attorneys for American Express Company, George C. Taylor, Individually and as President of the American Express Company, and Wells, Fargo & Company.

131 [Endorsed:] 4106. (14). In the Supreme Court of the State of South Dakota. State of South Dakota ex rel. Clarence C. Caldwell, as Attorney General, et al., Plaintiffs, vs. American Express Company, et al., Defendants. Assignment of Errors. Supreme Court, State of South Dakota. Filed Dec. 11, 1916. E. F. Swartz, Clerk. Supreme Court, State of South Dakota. Filed Dec. 14, 1916. E. F. Swartz, Clerk. Bailey & Voorhees, Attorneys for Defendants, Sioux Falls, S. D.

132 In the Supreme Court of the State of South Dakota.

October Term, 1916.

STATE OF SOUTH DAKOTA ex Rel. CLARENCE C. CALDWELL, as Attorney General of the State of South Dakota, and John J. Murphy, P. W. Dougherty, and William G. Smith, as and Constituting the Board of Railroad Commissioners of the State of South Dakota, Plaintiffs,

vs.

AMERICAN EXPRESS COMPANY and GEORGE C. TAYLOR, Individually and as President of the American Express Company, and Wells, Fargo & Company, Defendants.

Order.

The above entitled matter coming on to be heard upon the petition of the American Express Company, George C. Taylor, individually and as President of the American Express Company, and Wells Fargo & Company, for a writ of error from the Supreme Court of the United States to the Supreme Court of the state of South Dakota, and upon examination of said petition and the record in said matter, and desiring to give the petitioners an opportunity to present in the

Supreme Court of the United States the questions presented by the record in said matter, it is ordered that a writ of error be and the same is hereby allowed to this court from the Supreme Court of the United States, and that the bond presented by said petitioners, in the penal sum of One Thousand and No/100 Dollars ($1,000.00), with the United States Fidelity & Guaranty Company, as surety, for the prosecution of said writ of error and for the payment of all damages and costs in case said plaintiffs in error fail to make
133 their plea good, be and the same is hereby approved.

Dated at Pierre, South Dakota, this 11th day of December, 1916.

[Seal Supreme Court, State of South Dakota.]

SAMUEL C. POLLEY,
Presiding Justice of the Supreme Court of the State of South Dakota.

Attest:
E. F. SWARTZ, *Clerk.*

134 [Endorsed:] 4106. (15). In the Supreme Court of the State of South Dakota. State of South Dakota ex rel. Clarence C. Caldwell, as Attorney General, et al., Plaintiffs, vs. American Express Company, et al., Defendants. Order. Supreme Court, State of South Dakota. Filed Dec. 11, 1916. E. F. Swartz, Clerk. Supreme Court, State of South Dakota. Filed Dec. 14, 1916. E. F. Swartz, Clerk. Bailey & Voorhees, Attorneys for Defendants, Sioux Falls, S. D.

135 In the Supreme Court of the State of South Dakota, October Term, 1916.

STATE OF SOUTH DAKOTA ex Rel. CLARENCE C. CALDWELL, as Attorney General of the State of South Dakota, and John J. Murphy, P. W. Dougherty, and William G. Smith, as and Constituting the Board of Railroad Commissioners of the State of South Dakota, Plaintiffs,

vs.

AMERICAN EXPRESS COMPANY and GEORGE C. TAYLOR, Individually and as President of the American Express Company, and Wells Fargo & Company, Defendants.

Bond.

Know all men by these presents: That we, the American Express Company, George C. Taylor, individually and as President of the American Express Company, and Wells Fargo & Company, as principals, and the United States Fidelity & Guaranty Company, as surety, are held and firmly bound unto the state of South Dakota in the penal sum of One Thousand and No/100 Dollars ($1,000.00),

for the payment of which, well and truly to be made, we bind ourselves, our successors, heirs, executors and administrators, jointly and severally, firmly by these presents.

Witness our hands and seals, this 9th day of December, 1916.

The condition of the above obligation is such that whereas the above named American Express Company, George C. Taylor, individually and as President of the American Express Company, and Wells Fargo & Company have prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Supreme Court of the state of South Dakota,

136 Now therefore, if the said American Express Company, George C. Taylor, individually and as President of the American Express Company, and Wells Fargo & Company shall prosecute their said writ of error to effect, and if they fail to make their plea good, shall answer all damages and costs, then this obligation shall be void, otherwise to be and to remain in full force, effect and virtue.

AMERICAN EXPRESS COMPANY,
By C. O. BAILEY,
Its Attorney.
GEORGE C. TAYLOR,
Individually and as President of the American Express Company,
By C. O. BAILEY,
His Attorney.
WELLS FARGO & COMPANY,
By C. O. BAILEY,
Its Attorney.
UNITED STATES FIDELITY & GUARANTY CO.,
Baltimore, Md.,

[Seal of the United States Fidelity and Guaranty Co., Incorporated.]

By W. G. HOLLISTER,
Its Attorney-in-Fact.

137 United States Fidelity and Guaranty Company,

Home Office, Baltimore, Md.

STATE OF SOUTH DAKOTA,
County of Minnehaha, ss:

Be it known, That on this 9th day of December, 1916, before me, the undersigned, a Notary Public, of the State of South Dakota, in and for the County of Minnehaha personally appeared W. G. Hollister known to me to be the attorney-in-fact of the United States Fidelity and Guaranty Company, the corporation that is described in and

that executed the within undertaking, and acknowledged to me that such corporation executed the same.

I further certify that there was exhibited to me the original certificate of authority issued by the Commissioner of Insurance of the State of South Dakota, to the said United States Fidelity and Guaranty Company, and that the following is a full, true and complete copy of such certificate.

Company's Certificate of Authority.

Whereas, the United States Fidelity and Guaranty Company, a corporation organized under the laws of Maryland, has filed in this office a sworn statement exhibiting its condition and business for the year ending December 31st, 1915, conformable to the requirements of the laws of this State regulating the business of Insurance; and

Whereas, the said Company has filed in this office a duly certified copy of its charter, with certificate of organization, in compliance with the requirements of the Insurance Laws aforesaid;

Now, therefore, I, M. Harry O'Brien, Commissioner of Insurance of the State of South Dakota, pursuant to the provisions of said laws, do hereby certify that the above-named Company is fully empowered through its authorized agents to transact its appropriate business of Fidelity, Surety, Employers' Liability, Title Guaranty, Burglary, Accident, Health and Casualty Insurance in this State, according to the laws thereof, until the last day of February, A. D. 1917.

In testimony whereof, I have hereunto set my hand and official seal at Pierre, this 1st day of March, A. D. 1916.

M. HARRY O'BRIEN,
Commissioner of Insurance,
By F. C. MUELLER,
Chief Clerk.

Witness my hand and notarial seal the day and date first above written.

[Seal of C. G. Nelson, Notary Public, South Dakota.]

C. G. NELSON,
Notary Public, S. D.

This form is in compliance with paragraph 4, chapter 73, Laws of 1905.

[Endorsed:] 4106. (16.) In the Supreme Court of the State of South Dakota. State of South Dakota, ex rel. Clarence C. Cladwell, as Attorney General, etc., et al., Plaintiffs, vs. American Express Company, and George C. Taylor, Individually and as President of the American Express Company, and Wells Fargo & Company, Defendants. Bond. Supreme Court, State of South Dakota. Filed Dec. 11 1916. E. F. Swartz, Clerk. Supreme Court, State of South Dakota. Filed Dec. 14 1916. E. F. Swartz, Clerk. Bailey & Voorhees, Attorneys for Defendants, Sioux Falls, S. D.

138 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of South Dakota, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said Supreme Court of the state of South Dakota, before you, or some of you, being the highest court of law or equity of the said state in which a decision could be had in the said suit between the state of South Dakota ex rel. Clarence C. Caldwell, as attorney general of the state of South Dakota, and John J. Murphy, P. W. Dougherty and William G. Smith, as and constituting the Board of Railroad Commissioners of the state of South Dakota, plaintiffs, and the American Express Company and George C. Taylor, individually and as president of the American Express Company, and Wells Fargo & Company, defendants, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said state, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision was in favor of such, their validity; or wherein was drawn in question the construction of a clause of the constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said constitution, treaty, statute or commission, a manifest error hath happened, to the great damage of the said American Express Company and George C. Taylor, individually and as president of the American Express Company, and Wells Fargo & Company, as by their complaint appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States, together with this writ so that you have the same at Washing-
139 ton on the 12th day of February, 1917, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness, The Hon. Edward D. White, Chief Justice of the said Supreme Court, the 14th day of December, in the year of our Lord, one thousand nine hundred sixteen.

[Seal of the United States District Court of the State of South Dakota.]

OLIVER PENDER,
Clerk of the District Court of the United States
for the District of South Dakota.

Allowed by

HON. S. C. POLLEY,
Presiding Justice Supreme
Court of South Dakota.

140 [Endorsed:] 4106. (17.) In the Supreme Court of the United States. American Express Company et al., Plaintiffs in Error, vs. State of South Dakota, ex Rel. Caldwell, et al., Defendants in Error. Writ of Error. Supreme Court, State of South Dakota. Filed Dec. 14 1916. E. F. Swartz, Clerk. Bailey & Voorhees, Attorneys and Counsellors at Law, Sioux Falls, S. D.

141 In the Supreme Court of the United States.

AMERICAN EXPRESS COMPANY and GEORGE C. TAYLOR, Individually and as President of the American Express Company, and Wells Fargo & Company, Plaintiffs in Error,

vs.

THE STATE OF SOUTH DAKOTA, ex Rel. CLARENCE C. CALDWELL as Attorney General of the State of South Dakota, and John J. Murphy, P. W. Dougherty and William G. Smith, as and Constituting the Board of Railroad Commissioners of the State of South Dakota, Defendants in Error.

Personal service of the citation in the above entitled suit (said citation bearing date December 14th, 1916, and being signed by Hon. S. C. Polley, Presiding Justice of the Supreme Court of South Dakota) is hereby accepted this 18th day of December, 1916.

P. W. DOUGHERTY,
Member of the Board of Railroad Commissioners of the State of South Dakota.

142 In the Supreme Court of the United States.

AMERICAN EXPRESS COMPANY and GEORGE C. TAYLOR, Individually and as President of the American Express Company, and Wells Fargo & Company, Plaintiffs in Error,

vs.

THE STATE OF SOUTH DAKOTA, ex Rel. CLARENCE C. CALDWELL as Attorney General of the State of South Dakota, and John J. Murphy, P. W. Dougherty and William G. Smith, as and Constituting the Board of Railroad Commissioners of the State of South Dakota, Defendants in Error.

Personal service of the citation in the above entitled suit (said citation bearing date December 14th, 1916, and being signed by

Hon. S. C. Polley, Presiding Justice of the Supreme Court of South Dakota) is hereby accepted this 18th day of December, 1916.

JOHN J. MURPHY,
Member of the Board of Railroad Commissioners of the State of South Dakota.

143 In the Supreme Court of the United States.

AMERICAN EXPRESS COMPANY and GEORGE C. TAYLOR, Individually and as President of the American Express Company, and Wells Fargo & Company, Plaintiffs in Error,

vs.

THE STATE OF SOUTH DAKOTA, ex Rel. CLARENCE C. CALDWELL as Attorney General of the State of South Dakota, and John J. Murphy, P. W. Dougherty and William G. Smith, as and Constituting the Board of Railroad Commissioners of the State of South Dakota, Defendants in Error.

Personal service of the citation in the above entitled suit (said citation bearing date December 14th, 1916, and being signed by Hon. S. C. Polley, Presiding Justice of the Supreme Court of South Dakota) is hereby accepted this 18th day of December, 1916.

CLARENCE C. CALDWELL,
Attorney General of the State of South Dakota.

144 In the Supreme Court of the United States.

AMERICAN EXPRESS COMPANY and GEORGE C. TAYLOR, Indidually and as President of the American Express Company, and Wells Fargo & Company, Plaintiffs in Error,

vs.

THE STATE OF SOUTH DAKOTA, ex Rel. CLARENCE C. CALDWELL as Attorney General of the State of South Dakota, and John J. Murphy, P. W. Dougherty and William G. Smith, as and Constituting the Board of Railroad Commissioners of the State of South Dakota, Defendants in Error.

Personal service of the citation in the above entitled suit (said citation bearing date December 14th, 1916, and being signed by Hon. S. C. Polley, Presiding Justice of the Supreme Court of South Dakota) is hereby accepted this 19 day of December, 1916.

WILLIAM G. SMITH,
Member of the Board of Railroad Commissioners of the State of South Dakota.

UNITED STATES OF AMERICA,
District of South Dakota, ss:

I hereby certify and return that I served the within citation on Frank M. Byrne, as governor of the State of South Dakota, at Pierre, South Dakota on the 30th day of December, 1916, by handing to and leaving with him a true and correct copy thereof.

THOS. W. TAUBMAN,
United States Marshal.
By FRED L. VILAS, *Deputy.*

145 UNITED STATES OF AMERICA, *ss:*

To the State of South Dakota, ex rel. Clarence C. Caldwell, as Attorney General of the State of South Dakota, and John J. Murphy, P. W. Dougherty and William G. Smith, as and Constituting the Board of Railroad Commissioners of the State of South Dakota, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington, upon the 12th day of February, A. D. 1917, pursuant to a writ of error filed in the office of the clerk of the Supreme Court of the State of South Dakota, wherein the American Express Company and George C. Taylor, Individually and as President of the American Express Company, and Wells Fargo & Company are plaintiffs in error, and the State of South Dakota, ex rel, Clarence C. Caldwell, as Attorney General of the State of South Dakota, and John J. Murphy, P. W. Dougherty and William G. Smith as and constituting the Board of Railroad Commissioners of the State of South Dakota is defendant in error, to show cause, if any, why the judgment rendered against the said plaintiffs in error as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Given under my hand at the City of Pierre, in the State of South Dakota, this 14th day of December, 1916.

SAMUEL C. POLLEY,
Presiding Justice of the Supreme Court of the State of South Dakota.

146 [Endorsed:] 4106. Original. (21.) In the Supreme Court of the United States. American Express Company, et al, Plaintiffs in Error, vs. State of South Dakota, ex rel. Caldwell, et al, Defendant in Error. Citation. Supreme Court, State of South Dakota. Filed Jan. 5, 1917. E. F. Swartz, Clerk. Bailey & Voorhees, Attorneys and Counsellors at Law, Sioux Falls, S. D.

147 In the Supreme Court of the State of South Dakota, October Term, 1916.

STATE OF SOUTH DAKOTA ex Rel. CLARENCE C. CALDWELL, as Attorney General of the State of South Dakota, and John J. Murphy, P. W. Dougherty, and William G. Smith, as and Constituting the Board of Railroad Commissioners of the State of South Dakota, Plaintiffs,

vs.

AMERICAN EXPRESS COMPANY and GEORGE C. TAYLOR, Individually and as President of the American Express Company, and Wells Fargo & Company, Defendants.

Stipulation for Record.

Whereas, the above named defendants have sued out a writ of error in the above entitled suit from the Supreme Court of the United States to the Supreme Court of the State of South Dakota, it is hereby stipulated that in making up the return to said writ of error the clerk of this court shall include in the transcript the following portions of the record herein, to-wit: 1. Summons. 2. Complaint. 3. Motion of plaintiff for temporary injunction. 4. Affidavit for temporary injunction including Exhibit "A" thereto attached. 5. Order to show cause why temporary injunction be not issued. 6. Answer (omitting therefrom Exhibits "F" and "G" thereto). 7. Demurrer to answer. 8. Stipulation for judgment upon the pleadings. 9. Motion of defendants to vacate temporary re-
148 straining order. 10. Order denying motion of defendants to vacate temporary restraining order. 11. Order sustaining demurrer to answer. 12. Judgment. 13. Petition for writ of error. 14. Cost bond upon writ of error. 15. Order granting writ of error. 16. Assignment of errors. 17. Writ of error. 18. Citation. 19. Stipulation for record. 20. Minutes of clerk as to proceedings in case. 21. Opinion of Supreme Court.

It is further stipulated that in connection with the summons and complaint, the motion for temporary injunction and the order to show cause why a temporary injunction should not be issued, and the answer, the proofs of service shall be omitted from the transcript, but that as to the other papers included in the transcript the proofs of service shall be included and it is further stipulated and agreed that, regardless of the omission of Exhibit "F" attached to the answer, from the said record or transcript the parties hereto may in their briefs and arguments herein refer to the rates and other matters proposed in said tariffs for any and all purposes with the same effect as if each of said tariffs were fully set forth in said record.

Dated December 16, 1916.

CLARENCE C. CALDWELL,
P. W. DOUGHERTY,
OLIVER E. SWEET,
Attorneys for Plaintiffs.
T. B. HARRISON,
BRANCH P. KERFOOT, AND
C. O. BAILEY,
Attorneys for Defendants.

149 [Endorsed:] 4106. (20.) State ex rel. Caldwell et al. vs. American Express Co. et al. Stipulation. In re Record to be certified to U. S. Supreme Court. Supreme Court, State of South Dakota. Filed Dec. 28, 1916. E. F. Swartz, Clerk.

150 Supreme Court, State of South Dakota.

STATE OF SOUTH DAKOTA ex Rel. CLARENCE C. CALDWELL, as Attorney General of the State of South Dakota, and John J. Murphy, P. W. Dougherty, and William G. Smith, as and Constituting the Board of Railroad Commissioners of the State of South Dakota, Plaintiffs,

vs.

AMERICAN EXPRESS COMPANY and GEORGE C. TAYLOR, Individually and as President of the American Express Company, and Wells Fargo & Company, Defendants.

Original Proceeding in This Court.

Opinion Filed Jan. 20, 1917.

151 C. C. Caldwell, P. W. Dougherty, Oliver E. Sweet, Attorneys for Plaintiffs.

T. B. Harrison, Branch P. Kerfoot, Bailey & Voorhees, Attorneys for Defendants.

Charles W. Stockton, of Counsel.

E. E. Wagner and T. H. Null, Amici Curiæ.

Per CURIAM:

Plaintiffs seek to restrain defendants from putting into effect a certain schedule of rates governing charges for the transportation of express between Aberdeen, Mitchell, Sioux Falls, Watertown, and Yankton, commercial centers of this state, and all other cities and towns in the state. From the complaint, filed September 12, 1916, it appeared that the State Board of Railway Commissioners (hereinafter spoken of as the "Board") had theretofore, pursuant to statute (chap. 152, Laws 1911), established and put into effect a schedule of rates governing charges for the transportation of express between all points within this state, which schedule was still in full force and effect; that the statutes of this state (chap. 304, Laws 1913) provided that no advance should be made in rates so established except upon 30 days' notice to the Board and the public, and not until such advance had been allowed by the Board; and that defendant, on August 25, 1916, had presented for filing with the Board, and announced its intention of putting into force on September 15, 1916, a certain rate schedule, being the schedule first above referred to. This proposed schedule applied to all interstate traffic to and from every point in this state; it also applied between all stations in

this state, reached by the defendants, and the above five cities. The rates in the said schedule, in so far as they related to intrastate traffic, were materially higher than those named in the intra-
152 state rates then in force. Upon such complaint an order was issued restraining defendants from putting such schedule in force pending the final determination of this action. Defendants then answered admitting all the above facts, and alleging that their action in filing such schedule had been taken in obedience to an order of the Interstate Commerce Commission (hereinafter spoken of as the "Commission").

The following facts are conceded: A proceeding on behalf of the shippers of Sioux City, Iowa, and against these defendants had been theretofore brought before the Commission by the Traffic Bureau of the Sioux City Commercial Club. (See Traffic Bureau v. Am. Express Co., 39 I. C. C. Rep. 703). In such proceeding complaint was made that the rates charged by defendants, upon express shipments from Sioux City to "points in the state of South Dakota," being the interstate rates that had been established by the Commission, were "unjust, unreasonable and excessive in themselves and * * * in violation of the Act to Regulate Commerce * * *"; that such rates were very much higher than those from the South Dakota commercial centers to points equally distant in said state; and that the charging of such rates from Sioux City is "unjustly discriminatory and subjects * * * Sioux City as a jobbing center to undue and unreasonable prejudice and disadvantage." The plaintiff prayed that action be taken to end such discrimination. Defendants, answering, admitted the existence of the alleged discrimination complained of but denied responsibility therefor—alleging that the interstate rates charged by them were those established by the Commission and that the intrastate rates so charged were those established by the Board. Defendants asked, "that an order be entered requiring the removal of this unjust discrimination by applying to express shipments moving between all points in South Da-
153 kota the rates found reasonable by this Commission" in certain proceedings theretofore had before such Commission. The Commission stated that, by the above request, "the defendants seek to broaden the issues and bring before us for review the relation of rates on other movements than those involved in the complaint." 39 I. C. C. Rep. p. 704. Said proceeding resulted in the making of the following findings by the Commission:

(1) "That rates for the interstate transportation of shipments by express between Sioux City, Iowa, and points in the State of South Dakota heretofore prescribed by us as reasonable have not been shown to be unreasonable.

(2) "That the defendants maintain higher interstate rates between Sioux City and points in the State of South Dakota than between Sioux Falls, Mitchell, Aberdeen, Watertown and Yankton, South Dakota, and points in the same state applicable to shipments by express which are transported under substantially similar circumstances and conditions.

(3) "That thereby an undue preference is given to Sioux Falls,

Mitchell, Aberdeen, Watertown and Yankton, and an undue and unreasonable prejudice and disadvantage is effected against Sioux City.

(4) "That the defendants should cease and desist from continuing said undue preference and unjust discrimination."

Upon such findings the Commission entered the following order:

"It is ordered, That the above-named defendants, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before August 15, 1916, and thereafter to abstain, from publishing, demanding, or collecting higher rates for the transportation of shipments by express between Sioux City, Iowa, and points in the State of South Dakota than are contemporaneously published, demanded or collected for transportation under substantially similar circumstances and conditions for substantially equal distances between Sioux Falls, Mitchell, Aberdeen, Watertown and Yankton, South Dakota, on the one hand, and said points in the State of South Dakota on the other, which said relation of rates has been found by the Commission to be unjustly discriminatory.

"And * * *."

39 I. C. C. Rep. 703.

The Commission made no order approving or adopting the schedule of rates filed by defendants with the Board, nor any order
154 in any manner making such schedule its schedule unless the order above quoted had that effect. The Commission failed to prescribe what "points" in South Dakota its order should apply to, nor did it make any finding as to what portion of the lines over which defendants did business were in territory commercially tributary to Sioux City. In its report, after again referring to the effort of defendants to broaden the issues, it says: "We shall limit our findings to the allegations of unreasonableness and unjust discrimination found in the complaint." The only statement made by the Commission in its report touching upon the question of what territory is commercially tributary to Sioux City is found under the heading, "Location of Sioux City with Reference to Sioux City Traffic," under which heading the Commission, at p. 706 of 39 I. C. C. Rep., said. "The south-eastern section of South Dakota is thus a natural and important trade territory for Sioux City shippers whose principal competitors within the state are located at Sioux Falls, Mitchell, Aberdeen, and Watertown. Competition with dealers at Yankton in the sale of ice-cream is also shown." The rates named in the schedule filed with the Board were based upon the interstate rates between Sioux City and South Dakota territory and their enforcement would remove the discrimination complained of; but it clearly appears that their enforcement would result in as great if not a greater discrimination against commercial centers of South Dakota named in such order and in favor of all other points in this state, than now existing against Sioux City and in favor of the five cities to which the new intrastate rates apply.

Has this court jurisdiction to and should it permanently restrain defendants from putting such rates into force?

Defendants contend that this court has no jurisdiction of the subject matter of this action, citing the provisions of Act of
155 Congress, October 22, 1913,—38 Stat. at L. p. 219—that,

"The venue of any suit hereafter brought to enforce, suspend, or set aside, in whole or in part, any order of the Interstate Commerce Commission shall be in the [federal] judicial district * * *."

There are two answers to this contention: (1) This is not an action to "suspend or set aside" the order of the Commission but one to enjoin the putting into effect of a schedule of rates, neither prepared nor approved by the Commission and clearly not authorized by it, which schedule defendants are seeking to put into force in direct violation of the laws of this state. (2) If the purported order of the Commission does, in any respect, regulate intrastate commerce, it is to that extent void owing to the Commission's want of jurisdiction over the subject matter.

Having jurisdiction to act, should we permanently restrain the establishment of the proposed rates? Paraphrasing the words of Judge Landis in a recent decision, C. B. & Q. Ry. Co. v. State Public Utilities Commission of Illinois:

"We had a lawfully established intrastate schedule of rates. Defendants contend that such schedule has been superseded by the order of the Commission. How can such intrastate rates be lawfully superseded? It may be done by the Board, acting for the State of South Dakota; or it may be done by Congress, acting through the Commission, if the superseding of such intrastate rates comes within the exercise of the power of Congress to regulate commerce between the states."

Defendants contend that the Commission has authority to regulate and control intrastate rates, in so far as such regulation and control may be necessary in order to prevent unjust discrimination resulting from inequalities between such rates and interstate rates. In support of the above contention, defendants cite the decision of the federal Supreme Court (hereinafter spoken of as the "Supreme Court") in the so-called Shreveport Case, 234 U. S. 342, 58 L. ed. 1341. Plaintiffs contend that the law applicable to the facts of this case was announced by the Supreme Court in the Minnesota Rate Cases, (hereinafter spoken of as the "Minnesota" case), 230 U. S. 352, 57 L. ed. 1511, 48 L. R. A. (N. S.) 1151, 33 Sup. Ct. Rep. 729; and that the order of the Commission, if subject to the construction given it by defendants, is invalid in that the Commission was without authority over the subject matter thereof.

156 All controversy as to the authority of the Commission to control intrastate rates in order to remove discrimination resolves itself down to a dispute as to the scope and effect of certain provisions of the Interstate Commerce Act, and when we arrive at the proper construction of such provisions we must of necessity reach the proper determination of the existence or non-existence of such authority. There are certain propositions so axiomatic that they must be

presumed to have been in the minds of Congress when enacting such Act. Any discrimination that may exist, either against carriers, shippers, or consumers, arising solely from the charging of rates that are reasonable, cannot be removed by a change of rates without there result an unjust discrimination against either the carrier, the shipper, or consumer. Behind unjust discimination there always exists unreasonable,—that is, unjust and unfair—rates; therefore the sole remedy for unjust discrimination lies in the establishment of reasonable rates. Unreasonable rates being the cause and unjust discrimination the effect, the authority to remove unjust discrimination is to be measured by the authority to prescribe reasonable rates. Every appeal to a commission seeking the termination of discrimination is, in effect, a prayer for the establishment of reasonable rates. Such an appeal cannot be effective unless made to those having authority to prescribe rates. If, under its power to regulate interstate commerce, Congress can and does even indirectly fix the rates to be charged for intrastate commerce, even though such control professes to be limited in its territorial application, it must from the very necessities of commercial intercourse and competition result in a conformity of all intrastate rates to those thus prescribed. In other words, there is no such thing as a limited regulation by Congress of the charges for intrastate commerce—wherever Congress steps
157 in, the free action of the local authorities is throttled, as they must of necessity eliminate discrimination and can only do so by conforming all rates to those prescribed by the dominant power. Congress, by the specific provision of § 1 of the said Act, has declared it shall be unlawful for carriers to make, and it has prohibited them from making, unjust and unreasonable charges "for any service rendered or to be rendered in the transportation of * * * property * * * as aforesaid." The preceding provision of said section, to which the word "aforesaid" refers, clearly shows that the "transportation" contemplated is solely such as is purely interstate. This, it would seem, was made doubly certain by the proviso contained in the first paragraph of such section, which proviso is hereinafter quoted, and which proviso expressly refers to, and, it seems to us, clearly limits every provision of the whole Act. Certainly it cannot be presumed that Congress intended that the authority, given the Commission under § 15 of such Act, to enforce the provisions of § 3 thereof and thus prevent unjust discrimination, was intended to extend beyond and to be inconsistent with the corresponding authority, given to such Commission by §§ 1 and 15, to remove the cause of such discrimination. As throwing further light upon the intent of Congress in enacting such Act, it is well to note the situation at the time of such enactment. At that time it was fully settled by judicial decisions: (1) That the actual regulation of interstate commerce by Congress excluded state regulation thereof. (2) That the power to regulate internal commerce rests exclusively with the states. (3) That in matters pertaining to commerce, which matters are essentially national in their character and, for that reason, requiring national uniformity in regulation, failure of Congress to act does not

allow of state control; while, in matters local in character
158 though affecting interstate commerce, the power of the state is complete and unrestricted in absence of congressional action. Up to that time whatever attempt had been made to establish or regulate rates for transportation of either passengers or freight or to prevent discrimination in rate charges had been the work of the several states. The right of the states to legislate, so far as their legislation pertained to intrastate commerce, had been fully recognized by the federal courts. We know of no case, and we believe none can be cited, wherein the Supreme Court had, up to that time, held that, under the Commerce Clause of the federal Constitution, the power of Congress extended even to the indirect control of intrastate rates. It is true that, in numerous decisions, the federal control over the instrumentalities of commerce had been held to extend to instrumentalities having a situs local to a state if the same were used in connection with interstate commerce. But as has been well said:

"It may be asked, why may not Congress regulate intrastate rates, if it may require, as the Supreme Court has decided, the use of safety appliances on purely intrastate trains? The reason is that while interstate and intrastate rates may be interdependent for economic or geographical reasons, this is not the same direct interdependence that necessarily exists between trains or cars operated over the same tracks. A rate is a charge for, not an instrument of transportation."

By the Act in question Congress embarked into a new field of action. It enacted certain provisions declaring the policy that should govern those engaged in interstate commerce. It knew and fully recognized that it could not act directly in the fixing and adjusting of rates—that it could only exercise such power through the medium of some administrative body. But the Supreme Court concedes that Congress did not give to such administrative agency the power to directly regulate rates for intrastate traffic—a power upon which, as we have noted, should properly rest the power to remove discrimination where such discrimination can only be removed by a
159 change in intrastate rates. The Supreme Court, in the Shreveport case, says that Congress

"did not undertake to authorize the Commission to prescribe intrastate rates, and then to establish a unified control by the exercise of the rate-making power over both descriptions of traffic."

We do not believe sound logic will permit of the conclusion that, while Congress did not authorize the Commission to directly prescribe intrastate rates and thus establish a unified control over both interstate and intrastate rates, that it did intend to give it the power, under the guise of preventing unjust discriminations, to exercise exactly the same control. When we contemplate the inevitable result of giving to the Commission a dominant power over intrastate rates in even a limited territory, we must recognize that through the exercise of such power it must exert an indirect influence absolutely controlling the intrastate rates throughout the state. Therefore, in view of all the above, we do not believe that Congress intended to exert

any other than the power which at that time was conceded by all to have been given to it by the Constitution; and with all due respect to the Supreme Court, we are constrained to differ from it and hold that the proviso in §1 of said Act has the effect, just as it purports, of limiting "the provisions of this act," so that no provision, whether it be one found in §3 or elsewhere, "shall apply to the transportation of passengers or property * * * wholly within one state * * *" We think any other construction does violence to the plain wording of such proviso.

The point upon which the Supreme Court, in the Shreveport case, distinguished that from the Minnesota case was that, in the Minnesota case, Congress had not acted—that is, the Commission, through which Congress had undertaken to exert its power, had not made any finding of unjust discrimination and adjudged how it should
160 be eliminated. Keeping in mind that, in the Shreveport case, the court, when speaking of the failure of Congress to act, had reference to such failure of the Commission, the agent of Congress, to act, we find much of the apparent conflict between the two opinions disappears. But there yet remains that which we are unable to reconcile and which leads us to feel that the Supreme Court went further in the Shreveport case than precedent or any reasonable construction of the federal statute warrants. We shall not refer further to that part of the opinion in the Minnesota case, wherein the court discusses certain principles, the application of which supports the right of Congress to control the instrumentalities of intrastate commerce, and then says:

"These principles apply to the authority of the state to prescribe reasonable maximum rates for intrastate transportation."

Upon the above proposition taken as a premise the court reaches the conclusion that, through the medium of the Commission, Congress has undertaken to exercise a regulatory power or control over the state's authority to prescribe maximum intrastate rates. Even if we were to concede the premise we do not believe the conclusion follows, but do believe that Congress has expressly refused to exercise any such control.

The proviso in §1 of the Interstate Commerce Act reads:

"Provided, however, that the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one state, and not shipped to or from a foreign country, from or to any state or territory as aforesaid."

It was this proviso which was in the mind of the Supreme Court when, in the Minnesota case, it said,—the underscoring being ours:

"The question we have now before us, essentially, is whether, after the passage of the interstate commerce act, and its amendment, *the state continued to possess the state-wide authority* which it formerly enjoyed *to prescribe reasonable rates for its exclusively internal traffic.* * * *

161 "Having regard to the terms of the Federal statute, the familiar range of state action at the time it was enacted, the

continued exercise of state authority in the same manner and to the same extent after its enactment, *and the decisions of this court, recognizing and upholding this authority, we find no foundation for the proposition that the act to regulate commerce contemplated interference therewith.*

"*Congress did not undertake to say that the intrastate rates of interstate carriers should be reasonable, or to invest its administrative agency with authority to determine their reasonableness.* Neither by the original act nor by its amendment did Congress seek to establish a unified control over interstate and intrastate rates; *it did not set up a standard for interstate rates, or prescribe, or authorize the commission to prescribe, either maximum or minimum rates for intrastate traffic.* It cannot be supposed that Congress sought to accomplish by indirection that which it expressly disclaimed, or attempted to override the accustomed authority of the states without the provision of a substitute. On the contrary, *the fixing of reasonable rates for intrastate transportaion was left where it had been found;* that is, with the states and the agencies created by the states to deal with that subject. Missouri P. R. Co. v. Larabee Flour Mills Co., 211 U. S. 612, 620, 621, 53 L. ed. 352, 359, 360, 29 Sup. Ct. Rep. 214.

"How clear was the purpose not to occupy the field thus left to the exercise of state power is shown by the clause uniformly inserted in the numerous acts passed by Congress to authorize the construction of railways across the Indian territory. * * *

"The decisions of this court since the passage of the act to regulate commerce have uniformly recognized that it was competent for the state to fix such rates, applicable throughout its territory. If it be said that, in the contests that have been waged over state laws during the past twenty-five years, the question of interference with interstate commerce by the establishment of state-wide rates for intrastate traffic has seldom been raised, this fact itself attests the common conception of the scope of state authority. And the decisions recognizing and defining the state power *wholly refute the contention that the making of such rates either constitutes a direct burden upon the interstate commerce or is repugnant to the Federal statute.*"

Would it have been possible for such court to have used language by which it could have more clearly or specifically denied that Congress had asserted any right to extend federal authority over the field of intrastate commerce? And the above words were used more than a year after the Commission made its report in the Shreveport case and subsequent to the date of the decision of the Commerce Court in such case.

162 In the Shreveport case, just as in the case before us, the question before the court was the right of the carrier to end an existing discrimination, arising through the existence of interstate rates that were higher than intrastate rates, by raising the intrastate rates. The rates under consideration in that case were "commodity" rates while in this case they are "class" rates, but that fact

is entirely immaterial. In that case, the Supreme Court said, the underscoring being ours:

"Here, the Commission expressly found that unjust discrimination existed under substantially similar conditions of transportation, and the inquiry is whether the Commission had power to correct it. *We are of the opinion that the limitation of the proviso in §1 does not apply to a case of this sort.* The Commission was dealing with the relation of rates injuriously affecting, through an unreasonable discrimination, traffic that was interstate. The question was thus not simply one of transportation that was 'wholly within one state.' *These words of the proviso have appropriate reference to exclusively intrastate traffic, separately considered; to the regulation of domestic commerce, as such.* The powers conferred by the act are not thereby limited where interstate commerce itself is involved. This is plainly the case when the Commission finds that unjust discrimination against interstate trade arises from the relation of intrastate to interstate rates as maintained by a carrier subject to the act. Such a matter is one with which Congress alone is competent to deal, and, in view of the aim of the act and the comprehensive terms of the provisions against unjust discrimination, there is no ground for holding that the authority of Congress was unexercised, and that the subject was thus left without governmental regulation. It is urged that the practical construction of the statute has been the other way. But, in assailing the order, the appellants ask us to override the construction which has been given to the statute by the authority charged with its execution, and it cannot be said that the earlier action of the Commission was of such a controlling character as to preclude it from giving effect to the law. The Commission, having before it a plain case of unreasonable discrimination on the part of interstate carriers against interstate trade, carefully examined the question of its authority, and decided that it had the power to make this remedial order. The commerce court sustained the authority of the Commission, and it is clear that we should not reverse the decree unless the law has been misapplied. This we cannot say; on the contrary, we are convinced that the authority of the Commission was adequate."

We confess our inability to harmonize the parts underscored with what we have quoted from the opinion in the Minnesota case. At one fell swoop the Supreme Court, if it shall not withdraw in
163 some degree from the above, has absolutely destroyed the power of the states to prescribe maximum rates for intrastate traffic. It is idle to say that it would have power over all rates except those dictated by the Commission. As before noted, the prevention of discrimination would require it to conform its rates to those prescribed by the dominant power. We are not questioning but that it may be the part of wisdom for the states to give to the federal government such power, or if it has already given it, then for Congress to so amend its enactments as to assume the exercise of such power, but it seems to us that the question of expediency has no proper place in the discussion of either the power possessed by

Congress or the power exercised by that body. We are inclined to believe that the Supreme Court may have unconsciously been influenced by the fact that "the relation of intrastate to interstate rates" is" * * * a matter * * * with which Congress alone is competent to deal." We cannot believe that, because the Commission had "carefully examined the question of its authority and decided that it had the power to make this remedial order," the Supreme Court should have felt in any manner constrained to follow such holding. On the contrary, if there is any one thing established by experience, it is that courts should look with the utmost suspicion upon the holding of any person or body as to its own authority—they are prone to reach out and assume to themselves authority never intended to be granted them. We can not refrain from quoting the following words of the Supreme Court in the Minnesota case, the underscoring being ours:

"If the situation has become such * * * that adequate regulation of * * * interstate rates cannot be maintained without imposing requirements with respect to * * * intrastate rates which substantially affect the former, *it is for Congress to determine, within the limits of its constitutional authority over interstate commerce and its instruments the measure of the regulation it should supply. It is the function of this court to interpret and apply the law already enacted, but not under the guise of construction, to provide a more comprehensive scheme of regulation than Congress had decided upon.*"

164 While we are of the opinion that the language of the Act to Regulate Commerce is so clear as to admit of little doubt of the legislative intent and that, therefore, the question of expediency is entitled to little or no consideration; yet, in view of the fact that the Supreme Court in the Shreveport case advances the thought that "Congress alone is competent to deal" with "the relation of intrastate and interstate rates," we feel justified in suggesting that there is another power that can be relied upon to prevent injustice. The federal courts, through their power to set aside rates unjust to the interstate carrier, have full control over the only thing that will ever result in unjust discrimination as between interstate and intrastate traffic—the fixing by the Commission or the Board of a rate that is unjust to the carrier. As before stated, unreasonable rates are the sole cause of unjust discrimination. The reasonableness, as intrastate rates, of the rates established by the Board is unquestioned; it must stand absolutely conceded for the purposes of this case as it had to be conceded before the Commission. The commission had no power to pass on that question. Moreover, the record herein shows that defendants had sought to have the federal courts restrain the enforcement of such rates upon the ground that they were confiscatory and such relief had been refused. The intrastate rates being conceded to be reasonable as intrastate rates, there can be no unjust discrimination traceable thereto. If the intrastate rates were unreasonable the law provides no relief therefrom except before the Board or in the courts. We believe that Congress fully realized the impropriety, even if it had the power so to do, of placing

in the hands of a federal commission the authority to pass upon the reasonableness of intrastate rates as such, and that it intentionally withheld such power from the Commission. We would quote
165 with approval the following from the opinion of Commissioner McChord in the Shreveport Case:—

"The majority points out the chaotic conditions that will result if its view be not accepted. It avers that it will then be within the power of the carriers or of the states to make rates within a state, which will so confine the commerce of its communities as to exclude on equal terms other communities. The adoption of the constitution was an expression of the people's aim toward coordination rather than conflict between the sovereignties in the discharge of their respective powers. If, as suggested, our dual plan of government has led to chaos rather than harmony in the regulation of commerce, surely the corrective power has not been lodged with this Commission; and if not vested in the Congress, the final remedy is to be found, as said in Taylor v. Beckham, 178 U. S., 580, 'in the august tribunal of the people which is continually sitting.' But I apprehend that such a remedy will not be invoked until it has been more clearly demonstrated than has been done by the majority report that such conflict is real and not the result of misconception both of law and of fact. The Congress is able completely to regulate interstate transportation without the exercise of any control over transportation which lies wholly within a state; so, also, is this Commission, by the proper exercise of the powers which have been conferred. If the alleged preferential intrastate rates are reasonable, and if the transportation conditions from the interstate point to the common territory are similar, it follows that the interstate rates must be too high and should be reduced. But this is not because of discrimination; rather because of inherent unreasonableness. * * * If an unreasonably low intrastate rate be prescribed by a state commission, the order would not have to be obeyed."

We feel confident that, upon further consideration of these most important questions, the Supreme Court will recede, if not from the position it took in the Minnesota case in regard to the extent of the federal authority over interstate commerce, at least from the position it took in the Shreveport case in regard to the proper construction to be given to the Act to Regulate Commerce. Moved by such confidence, we deem it our duty to hold the order of the Commission, if subject to the construction given it by defendants, to be absolutely void owing to lack of authority in the Commission to make any such an order. If, however, this case shall reach the Supreme Court and it shall adhere to its decisions in the Minnesota and Shreveport cases, we shall cheerfully bow to its supreme authority and abide thereby.

166 We come now to another question of supreme importance. Conceding that the Commission had full authority to make the order involved in this case, and that, under such order, the defendants were authorized to raise rates for intrastate traffic, it does not follow that they had authority to raise such rates between the five named commercial centers of this state and every other nook

and corner of the state. Certainly Congress, in making the Commission its agency for the performance of certain administrative duties, never granted to it the authority to vest in the carriers the power to prescribe the territory to which one of its orders should apply. In the Shreveport case, the Commission fixed the maximum rates and expressly prescribed the territory to which the order should apply—in the case of two of the carriers, to their lines between Houston and Shreveport; in the case of the other carrier, to its line between Dallas and Shreveport. In the present case, the order was that defendants were to cease "collecting higher rates * * * between Sioux City, Iowa, and points in the State of South Dakota." * * * Such order was too indefinite to support any action by the defendants. The Commission could not leave with them the selection of the "points" to which the order should apply. It was incumbent upon defendants to get a sufficient order, one that, if valid, would support the entire schedule of rates which they sought to put into force. In the proceeding before the Commission the relief sought was the putting of an end to unjust discrimination against Sioux City and in favor of the five South Dakota cities. Such unjust discrimination, if it existed, must of the very necessity be confined to such territory as was commercially tributary, not only to the five South Dakota cities, but especially to Sioux City. The Commission made no finding as to what territory was commercially tributary to Sioux City. It did state in the body of its report that: "The south-eastern section of South Dakota is thus a natural and
167 important trade territory for Sioux City shippers." This court will take judicial notice of the geography of this state, its lines of railway, the location of these several cities. It will also take judicial notice that the larger part of this state, while commercially tributary to some one or more of the five South Dakota cities named, is not, in any respect, commercially tributary to Sioux City; furthermore that some portions of this state are not commercially tributary either to any one of such five cities or to Sioux City. Under such circumstances we certainly would be remiss in our duty if we allowed the proposed schedules to be put into force. Again paraphrasing the words of Judge Landis in the case of C. B. & Q. Ry. Co. v. State Public Utilities Commission of Illinois:

"Now, what has the traffic official done when he chose to raise the South Dakota rates to the level of the interstate rates? He looked carefully over this order of the Commission, and he found that such order did not prescribe the territory to which it was to apply and he believed that he need not limit himself to the relief of Sioux City, but that he could substitute the interstate rate between the five South Dakota cities and all intra-South Dakota points. It is true, defendants may call it relieving Sioux City, but, in no place outside of a court-room, would any man be heard to assert that, when you require a shipper to pay an increased rate for shipping express from Watertown, South Dakota, to South Shore, Florence or Altamont, or from Aberdeen to Lemmon, Ordway, or Milbank, or from any one of the five South Dakota cities named to Edgemont, you are relieving Sioux City of a discrimination. What you are

doing is relieving the defendants from the carrying of goods at a rate that, for the purposes of this case, must be presumed to be fair and just to the defendants, the shipper and the ultimate consumer."

One might as well claim that Chicago should have the right to require the railroads of the Empire State to adjust their intrastate rates to the interstate rates so as to remove discrimination existing against Chicago and in favor of New York City in commerce with the north-east corner of the Empire State.

Is it not possible that defendants have placed upon the words of the order a construction not intended by the Commission? The Commission did not order that the discrimination be removed
168 by an increase of intrastate rates. True it intimated in its report that such method of removing the discrimination would be justified by the facts. Why then did the Commission so word its order as to leave it optional with the defendants, and why did it omit to prescribe the territory to which its order should apply? May we not fairly presume that it was because the Commission realized that, in order to raise the intrastate rates, the defendants would be under the necessity of applying for authority to the Board or of establishing in court the unreasonableness of the intrastate rates, and that, if the Board or courts granted relief, it would be for them to prescribe the territory to which the new rates should apply? So construed the validity of the order is beyond question.

Another question is presented by the record herein, which, though subordinate to the ones already discussed, is important as affecting the outcome of the present action. By §10, ch. 207, Laws 1911, as amended by ch. 304, Laws 1913, no advance in intrastate rates may be made except after thirty days' notice to the Board by filing of schedules, and to the public by publication and posting in every office of the carrier in the state. Said act also provides that no change in rates shall go into effect until allowed by the Board. It is clear that, if the Commission has the authority claimed for it by defendants, the latter requirement could be disregarded, but it would seem that the requirement of notice to the Board and publication would be such a reasonable regulation as should be sustained. The order in question was made on May 23, 1916, it was by its terms to become effective August 15, 1916; ample time was thus given to the defendants to file their schedules and make the publications required by such statute. Such requirements as to filing and
169 notice are not in conflict with, nor derogatory to, the authority of the Commission. It is reasonable and just that defendant's patrons in South Dakota and the Board should be given thirty days' notice of an intention on the part of carriers to put into effect rates which so vitally affect transportation and especially transportation that is purely intrastate.

Plaintiffs are entitled to a judgment granting the relief prayed for and for costs.

170 STATE OF SOUTH DAKOTA,
In Supreme Court, ss:

STATE ex Rel. CLARENCE C. CALDWELL et al., Plaintiffs,
vs.
AMERICAN EXPRESS COMPANY et al., Defendants.

I, E. F. Swartz, Clerk of the Supreme Court in and for the State of South Dakota, do hereby certify that the foregoing pages numbered from 1 to 20 inclusive, contain a true and correct copy of the opinion of the Court in the above entitled cause, and of the whole thereof, as the same now remains of record in said Supreme Court.

In witness whereof I have hereunto set my hand and affixed the Seal of said Court, at Pierre, this 20th day of January A. D., 1917.

[Seal Supreme Court, State of South Dakota.]

E. F. SWARTZ,
Clerk of the Supreme Court.
By —— ——, *Deputy.*

171 In the Supreme Court of the State of South Dakota.

STATE OF SOUTH DAKOTA ex Rel. CLARENCE C. CALDWELL, as Attorney General, and John J. Murphy, P. W. Dougherty, and W. G. Smith, as and Constituting the Board of Railroad Commissioners of the State of South Dakota, Plaintiff,

vs.

AMERICAN EXPRESS COMPANY and GEORGE C. TAYLOR, Individually and as President of the American Express Company, and the Wells Fargo & Company, a Corporation, Defendants.

I, E. F. Swartz, Clerk of the Supreme Court of the State of South Dakota, do hereby certify that the following proceedings were had in the above entitled cause, to-wit:

The entering and filing of summons and complaint in said cause on the 12th day of September, 1916, also on said date entry and filing of motion and order to show cause in re restraining order. On said date said papers were delivered to Oliver E. Sweet, attorney for the South Dakota Railroad Commission and assistant Attorney General, for service, and were returned to this office with proof of service on September 16, 1916. Answer to complaint was entered and filed September 27, 1916. Demurrer to answer of defendants was entered and filed October 2, 1916, on which date said cause was called on order to show cause and argued by counsel. On October 3, 1916, there was entered and filed stipulation in re submission of cause upon the merits, etc. On October 31, 1916,

plaintiff's typewritten brief was entered and filed, and on November 1, 1916, defendants' brief was entered and filed. On De-
172 cember 5, 1916, in open court, defendants, by their counsel, made oral application for modification of temporary restraining order, and on the same day written motion to the same effect was entered and filed. Also, on the same date there was entered and filed an order denying motion to modify temporary restraining order, also order sustaining plaintiff's demurrer to defendants answer. On December 6, 1916, judgment granting permanent injunction was issued, entered and filed. On December 14, 1916, there was entered and filed petition for writ of error, *assign*, assignment of errors, order allowing writ of error, bond on appeal, and writ of error. On December 16, 1916, sheriff's return of service of judgment was entered and filed, also a certified copy of writ of error. On December 28, 1916, there was entered and filed stipulation of counsel in re record to be certified to the U. S. Supreme Court. On January 5, 1917, citation was entered and filed, and on January 20, 1917, the opinion of the Supreme Court of the State of South Dakota was rendered, entered and filed.

In Witness whereof I have hereunto set my hand and affixed the seal of said Supreme Court of the State of South Dakota, in my office in the City of Pierre in said State of South Dakota this 22nd day of January, 1917.

[Seal Supreme Court, State of South Dakota.]

E. F. SWARTZ,
Clerk of Supreme Court of the State of South Dakota.

173 UNITED STATES OF AMERICA,
State of South Dakota, ss:

In pursuance of the command of the writ of error within, I, E. F. Swartz, Clerk of the Supreme Court of the State of South Dakota, do hereby transmit a true copy of the record, assignment of errors and all proceedings in this case of the State of South Dakota, ex rel. Clarence C. Caldwell, as Attorney General, and John J. Murphy, P. W. Dougherty and W. G. Smith, as and Constituting the Board of Railroad Commissioners of the State of South Dakota, plaintiffs, vs. American Express Company and George C. Taylor, individually and as president of the American Express Company, and the Wells Fargo & Company, a Corporation, defendants, lately pending in the Supreme Court of the state of South Dakota, and do hereby certify that the above and foregoing is a true, full and correct transcript of the record in said case, as required by the stipulation of counsel, filed in said case.

In witness whereof, I have hereunto set my hand and affixed the seal of the said Supreme Court of the state of South Dakota, at my

office in the city of Pierre, in said state of South Dakota, this 22nd day of January, 1917.

[Seal Supreme Court, State of South Dakota.]

E. F. SWARTZ,
Clerk of the Supreme Court
of the State of South Dakota.

Endorsed on cover: File No. 25,732. South Dakota Supreme Court. Term No. 902. American Express Company, George C. Taylor, individually and as president of the American Express Company, and Wells Fargo & Company, plaintiffs in error, vs. The State of South Dakota ex rel. Clarence C. Caldwell, as attorney general of the State of South Dakota, et al. Filed January 27th, 1917. File No. 25,732.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.
No. 902.

AMERICAN EXPRESS COMPANY AND GEORGE C. TAYLOR, INDIVIDUALLY AND AS PRESIDENT OF THE AMERICAN EXPRESS COMPANY, AND WELLS FARGO & COMPANY, PLAINTIFFS IN ERROR,

vs.

STATE OF SOUTH DAKOTA *EX REL.* CLARENCE C. CALDWELL, AS ATTORNEY GENERAL OF THE STATE OF SOUTH DAKOTA, AND JOHN J. MURPHY, P. W. DOUGHERTY AND WILLIAM G. SMITH, AS AND CONSTITUTING THE BOARD OF RAILROAD COMMISSIONERS OF THE STATE OF SOUTH DAKOTA.

MOTION OF PLAINTIFFS IN ERROR TO ADVANCE HEARING.

Now come the above named plaintiffs in error, the American Express Company and George C. Taylor, individually and as president of the American Express Company, and Wells Fargo & Company and move the court that this case be advanced and that said case be set down for hearing at an early date to be designated by the court, and respectfully show unto the court:

That this suit is an original suit brought in the Supreme Court of the state of South Dakota, in the name of said state on the relation of its Attorney General and Board of Railroad Commissioners, to enjoin plaintiffs in error from complying with an order of the Interstate Commerce Commission requiring them to cease from continuing discriminations in certain express rates in the state of South Dakota. To reverse the final decision of the Supreme Court of South Dakota granting a permanent injunction restraining compliance with the order of the Interstate Commerce Commission, this writ of error has been taken.

The facts, as disclosed by the record in this case, are as follows: in 1911 the Board of Railroad Commissioners of the state of South Dakota, pursuant to a statute of that state, promulgated a schedule of maximum charges for the transportation of ex-

press freight instrastate in South Dakota. This schedule was made upon a distance basis. It was known as South Dakota Express Distance Tariff No. 2 and is still in force in that state. (Transcript pp. 3, 24, 32.)

In the year 1912, the Interstate Commerce Commission entered upon an investigation of express rates, practices, accounts and revenues. The result of this investigation was the promulgation by the Interstate Commerce Commission of a zone and block system of express rates whereby the rates for the interstate transportation of property by express throughout the United States were placed upon a uniform basis. The zone and block rates were put into effect by the express companies February 1, 1914, and, excepting as subsequently modified by the Interstate Commerce Commission, remain in effect. (24 ICC Rep. 380. 28 ICC Rep. 131. 35 ICC Rep. 3.)

In 1914, and after the Interstate Commerce Commission rates had been put into effect, the Traffic Bureau of the Sioux City Commercial Club filed with the Interstate Commerce Commission its petition against plaintiffs in error, the American Express Company and Wells Fargo & Company in which petition the rates for transportation by express between Sioux City and points in the state of South Dakota were attached as unreasonably prejudicial and disadvantageous to Sioux City. These allegations of undue prejudice and disadvantage were predicated upon a comparison with the express rates applicable between Sioux Falls, Aberdeen, Watertown, Mitchell and Yankton and points in the state of South Dakota. Relief was asked that an order be entered requiring the express companies to publish and maintain express rates between Sioux City and South Dakota points which are no higher than those contemporaneously maintained for substantially the same distances between the South Dakota cities, competing with Sioux City in the South Dakota territory, and other points in the state. (Transcript p. 25.)

The state of South Dakota, the Attorney General and the Board of Railroad Commissioners of that state, and the commercial clubs of Sioux Falls, Aberdeen, and Mitchell intervened in the Sioux City case before the Interstate Commerce Commission. Hearings were had and evidence taken upon the part of the complainant, the defendants and the intervenors. The case was argued November 20, 1915, before the Interstate Commerce Commission and a decision was announced May 23, 1916. (Traffic Bureau of the Sioux City Commercial Club vs. American Express Company, et al, 39 ICC Rep. 703.) In its opinion the Interstate

Commerce Commission arrived at the following conclusion:

"This Commission had not then made the exhaustive investi-"gation of the express rates which has since been completed, Ex-"press Investigation, *supra*. We are here under no doubt as to "how the unjust discrimination found to exist should be correct-"ed, for the record conclusively shows that the South Dakota "rates are too low to be made the measure of interstate rates be-"tween Sioux City and South Dakota points, while there is no "proof that the rates which this Commission has approved are "unreasonable, nor has a basis been laid for a modification of "our order.

"We accordingly find:

"(1) That rates for the interstate transporation of shipments "by express between Sioux City, Iowa, and points in the state of "South Dakota heretofore prescribed by us as reasonable have "not been shown to be unreasonable.

"(2) That the defendants maintain higher interstate "state rates between Sioux City, and points in the state of "South Dakota, than between Sioux Falls, Mitchell, Aber-"deen, Watertown, and Yankton, S. Dak., and points in the same "state applicable to shipments by express which are transported "under substantially similar circumstances and conditions.

"(3) That thereby an undue preference is given to Sioux "Falls, Mitchell, Aberdeen, Watertown, and Yankton, and an un-"due and unreasonable prejudice and disadvantage is effected "against Sioux City.

"(4) That the defendants should cease and desist from con-"tinuing said undue preference and unjust discrimination.

"An appropriate order will be entered."

The order made by the Interstate Commerce Commission provided as follows:

"IT IS ORDERED, That the above-named defendants, accord-"ing as they participate in the transportation, be, and they are "hereby, notified and required to cease and desist, on or before "August 15, 1916, and thereafter to abstain, from publishing, "demanding, or collecting higher rates for the transportation of "shipments by express between Sioux City, Iowa, and points in "the state of South Dakota, than are contempraneously published, "demanded, or collected for transportation under substantially "similar circumstances and conditions for substantially equal "distances between Sioux Falls, Mitchell, Aberdeen, Watertown, "and Yankton, S. Dak., on the one hand, and said points in the "state of South Dakota on the other which said relation of rates

"has been found by the Commission to be unjustly discrimina-
"tory.

"AND IT IS FURTHER ORDERED That this order shall con-
"tinue in force for a period of not less than two years from the
"date when it shall take effect." (Transcript pp. 54-55.)

The Interstate Commerce Commission subsequently modified its order by extending the time for the express companies to remove the discrimination in rates from August 15, to September 15, 1916.

The express companies prepared and filed with the Interestate Commerce Commission tariffs complying with its order by which tariffs the rates between Sioux Falls, Mitchell, Aberdeen, Watertown and Yankton, and other points in South Dakota, were made the same as from Sioux City to points in South Dakota for substantially equal distances, and as to all other South Dakota intrastate traffic the rates fixed by the South Dakota Distance Tariff No. 2 were left in effect. In other words, the tariffs filed by the express companies made no change whatever in the South Dakota intrastate rates except such as were necessary to comply with the order of the Interstate Commerce Commission. These tariffs were also sent to the South Dakota Railroad Commission but that Commission refused to accept or file them. (Transcript pp. 27-28.)

On August 28, 1916, the Brown Drug Company and other wholesalers, jobbers and manufacturers of Sioux Falls, together with the Commercial Clubs of Sioux Falls, Mitchell, Watertown, Aberdeen and Yankton, filed in the District Court of the United States, for the Western Division of the Northern District of Iowa, their petition against the United States of America, the Interstate Commerce Commission, the express companies and the Sioux City Commercial Club. This suit was brought to suspend, set aside and enjoin the order of the Interstate Commerce Commission in the Sioux City case. A motion for an interlocutory injunction was made by the plaintiffs and this motion was heard by United States Circuit Judge Walter I. Smith and United States District Judges Henry T. Reed and Martin J. Wade, at Cedar Rapids, Iowa, on September 7th and 8th. At the conclusion of the hearing the court denied the motion for an injunction. (Brown Drug Co. vs. United States, 235 Fed. 603. Transcript pp. 28, 73, 83-84.)

On September 12, 1916, the complaint in this suit was filed in the Supreme Court of the state of South Dakota and upon the ex parte application of the defendant in error there was issued

an order upon the plaintiffs in error to show cause why an interlocutory injunction be not issued. This order to show cause contained a temporary restraining order prohibiting the express companies from putting into effect the rates ordered by the Interstate Commerce Commission until after the hearing and determination of the motion for an interlocutory injunction. (Transcript pp. 11, 13.) While this temporary restraining order remained in effect the case was brought on for final hearing in the Supreme Court of the state of South Dakota on October 1, 1916, and upon December 4, 1916, a final judgment was entered granting a permanent injunction against the putting into effect of the rates provided by the order of the Interstate Commerce Commission. (Transcript pp. 89-90.) To reverse this judgment, this writ of error has been sued out. (Transcript pp. 91-97, 106-118.)

The contention of the plaintiffs in error is that the order made by the Interstate Commerce Commission was an order within the jurisdiction and authority of the Commission and that no gounds exist why it should be set aside or why its operation should be enjoined. It is further contended that under the provisions of the act creating the commerce court (Sections 200-214 Judicial Code) and under the act of October 2, 1913, (Part 1, Vol. 38, Stat. at L. pp. 219-221), the district courts of the United States are given exclusive jurisdiction of all "suits to enjoin, set aside, annul or suspend any order of the Interstate Commerce Commission" and that consequently the Supreme Court of the state of South Dakota possessed no jurisdiction to entertain this action or to grant an injunction against the enforcement of the order made in the Sioux City case by the Interstate Commerce Commission.

The plaintiffs in error are in this situation: They have been ordered by the Interstate Commerce Commission to cease making certain discriminations in express rates in South Dakota. If they do not comply with this order, they are subject to the penalties, provided by Section 16 of the Act to Regulate Commerce, of five thousand dollars per day. They have been enjoined by the Supreme Court of South Dakota from complying with the order of the Interstate Commerce Commission and cannot obey the order of the Commission without being in contempt of the South Dakota Supreme Court. The federal statute confers upon the district courts of the United States exclusive jurisdiction in cases brought to enjoin the operation of an order of the Interstate Commerce Commission but the Supreme Court of South Dakota has

held, that notwithstanding this statute, it possesses the authority to issue an injuction restraining compliance with an order of the .Commission. Plaintiffs in error are between Scilla and Charybdis. If they comply with the order of the Interstate Commerce Commission they place themselves in contempt of the Supreme Court of the state of South Dakota. If they do not comply with the order, they are subject to the penalties of five thousand dollars per day prescribed by the sixteenth section of the Act to Regulate Commerce.

This case is one which is of importance, not only to the parties to it and to the communities affected by the order of the Interstate Commerce Commission, but to the public at large. The Supreme Court of South Dakota has seen fit to assume a jurisdiction which an act of Congress has conferred exclusively upon the district courts and it has further expressly declined to follow the decisions of this court in the Minnesota Rate Cases (230 U. S. 352) and in the Shreveport case (234 U. S. 342), making in its opinion the declaration that:

"We feel confident that, upon further consideration of these "most important questions, the Supreme Court will recede, if not "from the position it took in the Minnesota case in regard to the "extent of the federal authority over interstate commerce, at least "from the position it took in the Shreveport case in regard to the "proper construction to be given to the Act to Regulate Com-"merce. Moved by such confidence, we deem it our duty to hold "the order of the Commission, if subject to the construction given "it by defendants, to be absolutely void owing to lack of author-"ity in the Commission to make any such an order. If, however, "this case shall reach the Supreme Court and it shall adhere to "its decisions in the Minnesota and Shreveport cases, we shall "cheerfully bow to its supreme authority and abide thereby." (Transcript p. 116.)

In view, not only of the hardship to plaintiffs in error through the conflict of jurisdiction between the Interstate Commerce Commission and the Supreme Court of South Dakota, but also of the public importance of this case, by reason of the fact that the South Dakota court has assumed jurisdiction of a subject committed by Congress exclusively to the district courts and has expressly assumed to override the decisions of this court in the Minnesota Rate Cases and in the Shreveport case, we ask that

the hearing of this case be advanced in order that a speedy determination may be made of the issues disclosed by the record. by the record.

T. B. HARRISON,
BRANCH P. KERFOOT,
C. O. BAILEY,
Solicitors for Plaintiffs in Error.

No. 902.

In the Supreme Court of the United States.

OCTOBER TERM, 1916.

AMERICAN EXPRESS COMPANY, GEORGE C. TAYLOR, INDIVIDUALLY AND AS PRESIDENT OF THE AMERICAN EXPRESS COMPANY, AND WELLS FARGO & COMPANY, PLAINTIFFS IN ERROR,

v.

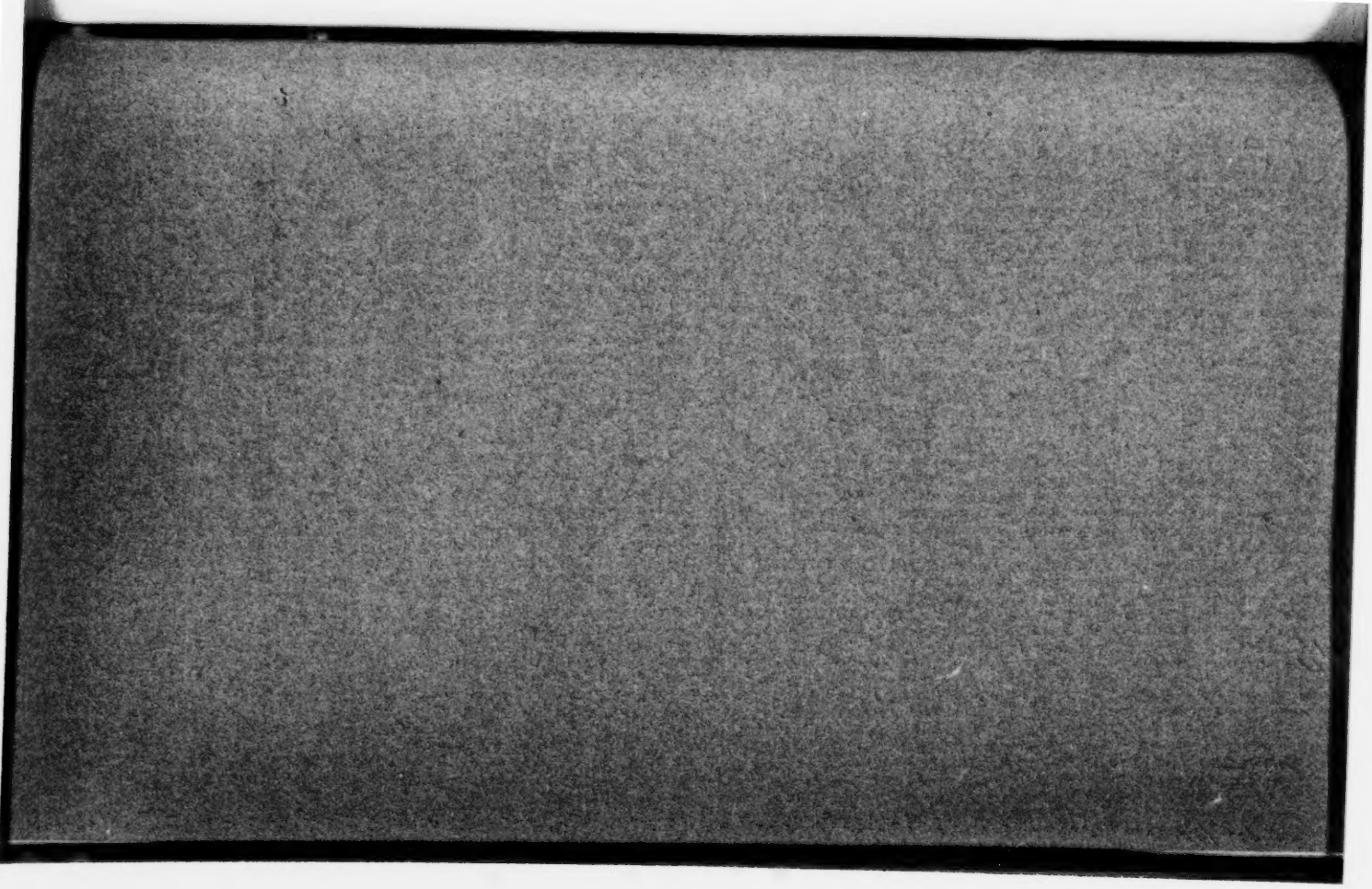
STATE OF SOUTH DAKOTA EX REL., CLARENCE C. CALDWELL, AS ATTORNEY GENERAL OF THE STATE OF SOUTH DAKOTA, AND JOHN J. MURPHY, P. W. DOUGHERTY, AND WILLIAM G. SMITH, AS AND CONSTITUTING THE BOARD OF RAILROAD COMMISSIONERS OF THE STATE OF SOUTH DAKOTA, DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA.

BRIEF IN SUPPORT OF THE PLAINTIFFS IN ERROR.

JOSEPH W. FOLK,
CHARLES W. NEEDHAM,
As Amici Curiae, on behalf of the Interstate Commerce Commission.

WASHINGTON : GOVERNMENT PRINTING OFFICE : 1917



SYNOPSIS AND INDEX.

The Railroad Commission of South Dakota, pursuant to a statute of that state, established a schedule of local distance rates for the transportation by express of traffic within the state. Subsequently the Interstate Commerce Commission, in order to secure the application of uniformly reasonable express rates, established a zone and block system to be applied throughout the United States. This system having been adopted by the carriers, including the express companies operating in South Dakota, certain shippers at Sioux City, Iowa, complained to the Interstate Commerce Commission that certain of the interstate rates established in accordance with its order, and applicable to traffic from Sioux City to competitive points in South Dakota, were substantially higher than the local rates established by the state commission between competitive points in South Dakota. Complainants alleged that by reason of this disparity in rates they were subjected to unreasonable prejudice and disadvantage and asked for an order requiring the removal of such discrimination.

The state of South Dakota and the state commission intervened as defendants in the proceeding before the commission, and were represented at a full hearing accorded to all the parties thereto. After such hearing the Interstate Commerce Commission filed a report in which it found that the interstate rates between the points in question had not been shown to be unreasonable; that such rates were higher than the local rates applied to substantially similar transportation in South Dakota; and that an undue preference had thereby resulted in favor of points in South Dakota to the undue prejudice and disadvantage of Sioux City. Pursuant to these findings, the Interstate Commerce Commission ordered the carriers to abate the discrimination so found to exist and to abstain from publishing, demanding, or collecting higher rates for transportation by express from Sioux City to competitive points in South Dakota than are contemporaneously applied under substantially similar circumstances and conditions to transportation between points in South Dakota.

STATEMENT OF THE CASE—Continued. Page.

The carriers thereupon appealed to the state commission for authority to advance their local charges in South Dakota to the basis of the interstate rates, but this application was denied. The carriers, notwithstanding the denial of their application, published tariffs advancing their intrastate rates to the level of the rates approved by the Interstate Commerce Commission, but these tariffs were rejected by the state commission. Various shippers at Sioux Falls, South Dakota, filed, in the District Court of the United States for the Northern District of Iowa, a petition to enjoin the order of the Interstate Commerce Commission, but their application, after hearing, was denied.

Thereupon the defendants in error instituted a proceeding in the Supreme Court of South Dakota to enjoin the express companies from filing tariffs to comply with the order of the Interstate Commerce Commission, and from a decree entered by that court in accordance with the prayer of the petition the carriers appealed.

The rates established by the state commission are substantially different from those approved by the Interstate Commerce Commission, and such disparity has been found by the Interstate Commerce Commission to constitute an unjust and unreasonable preference of cities in South Dakota, to the disadvantage of Sioux City, Iowa. The vital issue, therefore, is whether the authority of the state commission or of the Interstate Commerce Commission shall prevail. This question has heretofore been decided by this Court in favor of the Interstate Commerce Commission. *Shreveport Case*, 234 U. S. 342. It is therefore submitted that the decree of the Supreme Court of South Dakota should be reversed, and that the petition of the defendants in error for an injunction should be dismissed.

TABLE OF CASES.

In the Supreme Court of the United States.

OCTOBER TERM, 1916.

AMERICAN EXPRESS COMPANY, GEORGE C. Taylor, individually and as president of the American Express Company, and Wells Fargo & Company, plaintiffs in error, *v.* STATE OF SOUTH DAKOTA EX REL., CLARENCE C. Caldwell, as Attorney General of the State of South Dakota, and John J. Murphy, P. W. Dougherty, and William G. Smith, as and constituting the Board of Railroad Commissioners of the State of South Dakota, defendants in error.	No. 902.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA.

BRIEF IN SUPPORT OF THE PLAINTIFFS IN ERROR.

STATEMENT OF THE CASE.

This case is here on writ of error to review the decree of the Supreme Court of South Dakota in an original case, wherein the State of South Dakota on the relation of the attorney general and board of

railroad commissioners sought to enjoin the plaintiffs in error from putting into effect and collecting certain express rates established by the express companies to comply with an order of the Interstate Commerce Commission. The opinion of the lower court deals mainly with the validity of the order and the jurisdiction of the Interstate Commerce Commission to make the order.

The Board of Railroad Commissioners of the State of South Dakota, hereinafter called the Board, pursuant to a statute of that State, established for the transportation of express matter between points within the State a schedule of distance rates.

Subsequently the Interstate Commerce Commission, hereinafter called the Commission, in an investigation entitled *In the Matter of Express Rates, Practices, Accounts, and Revenues*, 24 I. C. C., 380, established what is known as a zone and block system of rates applicable to interstate transportation by express companies. The system and rates were adopted to secure a uniform basis of reasonable charges by express companies throughout the United States. The order was modified in some respects in 1913 and 1915, 28 I. C. C., 132; and 35 I. C. C., 3. As modified, the express rates established by the Commission were adopted and put into effect by all interstate carriers of express matter and, at the times herein mentioned, were published and applied by the plaintiffs in error to interstate shipments.

Thereafter the Traffic Bureau of the Sioux City Commercial Club, representing merchants and ship-

pers by express located at Sioux City, Iowa, filed a complaint with the Commission against the plaintiffs in error, alleging that the express rates between Sioux City, Iowa, and points of destination in the State of South Dakota were unreasonable and unduly and unreasonably prejudicial and disadvantageous to Sioux City. The allegations of undue prejudice and disadvantage were predicated upon comparisons of the interstate rates from Sioux City with the intrastate rates established by the Board, applicable between Sioux Falls, S. Dak., and other border cities to the same points of destination within the State of South Dakota. In other words, it was claimed that the intrastate express rates on commodities from the cities near the state line between South Dakota and Iowa to points in competitive territory in the State of South Dakota were substantially lower than the interstate express rates from Sioux City, Iowa, to the same points in the competitive territory, and that this substantial difference in rates created unreasonable prejudice and disadvantage to the merchants and dealers in Sioux City, Iowa, and undue and unreasonable preference and advantage to those doing the same business in Sioux Falls and other border cities in the State of South Dakota. The complaint prayed that an order be entered requiring the plaintiffs in error to publish and maintain express rates between Sioux City, Iowa, and South Dakota competitive territory which should be no higher than those contemporaneously maintained for substantially the same distances between the border cities in South Dakota

and like points in competitive territory in the State of South Dakota.

The plaintiffs in error were made parties defendant to the complaint, and the State of South Dakota and the Board intervened as defendants. Rec. p. 36. A full hearing was accorded to all the parties, and on the 23d day of May, 1916, the Commission filed its report, as required by the act to regulate commerce. 39 I. C. C., 703; Rec. p. 34 et seq. The report concludes with these findings of fact, Rec. p. 54:

> (1) That the rates for the interstate transportation of shipments by express between Sioux City, Iowa, and points in the State of South Dakota heretofore prescribed by us as reasonable have not been shown to be unreasonable.
>
> (2) That the defendants maintain higher interstate rates between Sioux City and points in the State of South Dakota than between Sioux Falls, Mitchell, Aberdeen, Watertown, and Yankton, S. Dak., and points in the same State applicable to shipments by express which are transported under substantially similar circumstances and conditions.
>
> (3) That thereby an undue preference is given to Sioux Falls, Mitchell, Aberdeen, Watertown, and Yankton, and an undue and unreasonable prejudice and disadvantage is effected against Sioux City.
>
> (4) That the defendants should cease and desist from continuing said undue preference and unjust discrimination.

Thereupon the Commission entered an order, in material part, as follows, Rec. pp. 54–55:

> This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:
>
> *It is ordered*, That the above-named defendants, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before August 15, 1916, and thereafter to abstain, from publishing, demanding, or collecting higher rates for the transportation of shipments by express between Sioux City, Iowa, and points in the State of South Dakota, than are contemporaneously published, demanded, or collected for transportation under substantially similar circumstances and conditions for substantially equal distances between Sioux Falls, Mitchell, Aberdeen, Watertown, and Yankton, S. Dak., on the one hand, and said points in the State of South Dakota on the other, which said relation of rates has been found by the Commission to be unjustly discriminatory.
>
> *And it is further ordered*, That this order shall continue in force for a period of not less than two years from the date when it shall take effect.

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The effective date of this order was extended to September 15, 1916, since which date the order has been in full force and effect.

On the 27th day of July, 1916, fifty days before the order went into effect, a conference was held between the Board and the plaintiffs in error, and with others, regarding the raising of the intrastate rates to the level of the interstate rates from the cities named in the Commission's order, to comply with that order. Rec., pp. 4, 5, 26, 27, 60, 61. This conference resulted in an order by the Board, August 5, 1916, which in part reads, Rec., pp. 61, 62:

> *And it is further ordered*, That the application of the Adams Express Company, American Express Company, Great Northern Express Company, and Wells Fargo & Company to put into effect on intrastate traffic in this State from the stations of Aberdeen, Watertown, Sioux Falls, Mitchell, and Yankton to points in the State of South Dakota, *as well as their application to put into effect on intrastate traffic in this State*, the system of zone or block rates approved by the Interstate Commerce Commission, until the further order of this Board in the premises, *be, and same hereby is, denied.* [Italics ours.]

The laws of South Dakota provide that no advance in intrastate rates may be made except after 30 days' notice to the Board, and to the public *by posting in every office of the carrier in the State;* and that no change in rates shall go into effect until allowed by the Board. Rec., p. 118.

Notwithstanding the order of the Board, entered on the 5th day of August, 1916, *refusing permission to file their tariffs* to comply with the order of the Commission, the plaintiffs in error, *on the 15th day of August, 1916*, promulgated and published in their offices express rates on intrastate traffic, raising the existing rates to the level of the interstate rates from the cities named in the Commission's order to comply with that order, and on the 25th day of August, 1916, the carriers tendered these tariffs to the Board for filing. The Board, pursuant to its previous order of August 5, 1916, refused to file the same. Rec., pp. 27, 28. The tariffs are clearly identified in the record.

On the 28th day of August, 1916, a bill was filed in the District Court of the United States for the Northern District of Iowa, Western Division, by the Brown Drug Company and others, of Sioux Falls, S. Dak., against the United States Interstate Commerce Commission, plaintiffs in error, et al., Rec., p. 73, to enjoin the order of the Commission. The district court, three judges sitting, heard arguments upon a motion for a temporary injunction and on the 8th day of September, 1916, denied the motion. Rec., pp. 83, 84. While not appearing of record, Mr. P. W. Dougherty, attorney for defendants in error, was present at the hearing and decision of this motion for injunction. Rec., p. 28. Three days later, September 11, the defendants in error commenced this suit in the Supreme Court of the State of South Dakota, Rec., p. 1, to enjoin the express

companies from filing the tariffs already published to comply with the order. A restraining order was issued by the supreme court as prayed, on September 12, 1916, and on the 6th day of December, 1916, a final decree was entered enjoining the plaintiffs in error—

> from putting into effect the tariffs, tables, classifications, rules, regulations, or practices presented by such express companies to the railroad commission of the State of South Dakota on the 25th day of August, 1916, or any of the rates, fares, or charges specified in said tables between the cities of Aberdeen, Mitchell, Sioux Falls, Watertown, and Yankton, in the State of South Dakota, and other stations of the said express companies in said State * * * over lines of railway wholly within said State * * * unless or until a schedule of express rates shall have first been submitted to the board of railroad commissioners of the State of South Dakota and have been regularly approved and allowed by said board in conformity to the laws of the State of South Dakota. Rec., pp. 89, 90.

The Supreme Court of South Dakota filed its opinion, giving the reasons and grounds for the decree. Rec., p. 106 et seq.

ARGUMENT.

The assignments of error controvert every determination of law by the Supreme Court of South Dakota, Rec., p. 106 et seq., and as the decree rests upon the opinion of that court, Rec., p. 106 et seq.,

the questions of law will be considered in the order therein stated.

I.

THE INTERSTATE COMMERCE COMMISSION IS EMPOWERED TO FIX MAXIMUM RATES AND TO REMOVE DISCRIMINATION.

The court below, in its opinion, Rec., p. 108, said:

> The Commission made no order approving or adopting the schedule of rates filed by defendants with the Board, nor any order in any manner making such schedule its schedule unless the order above quoted had that effect.

1. The power of the Commission to establish rates for the future was conferred by the Hepburn act, as found in section 15 of the act to regulate commerce. This power is expressly limited to the fixing of maximum rates where the Commission finds existing rates unreasonable. A finding of unreasonableness is a condition precedent to the fixing of a rate.

> The Commission's right to act depends upon the existence of this fact, and if there was no evidence to show that the rates were unreasonable, there was no jurisdiction to make the order. [*Int. Com. Com.* v. *Louisville & N. R. Co.*, 227 U. S., 88, 92.]

As to the reasonableness of the interstate express rates from Sioux City, the finding of the Commission, quoted in the opinion, Rec. p. 107, was that the existing interstate rates from Sioux City, Iowa, to points in the State of South Dakota "have not been shown to be unreasonable." The Commission, therefore, had no power to fix any rates or to order a reduction of existing interstate rates.

2. The second and third findings by the Commission were that the difference between the interstate rate from Sioux City and intrastate rates from Sioux Falls and other cities named to common points in South Dakota gave an undue preference to Sioux Falls and the other cities named and created an undue and unreasonable prejudice and disadvantage against Sioux City. Having thus found the facts, the Commission is empowered by section 15 *to order the carrier* to "cease and desist from such violation" of the act. The violation referred to is of the provision of section 3:

> That it shall be unlawful for any common carrier, subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person * * * or locality, * * * in any respect whatsoever, or to subject any particular person * * * or locality * * * to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Under these findings, Nos. 3 and 4, the Commission had power to make the order in question. This imposed upon the carriers the duty of removing the discrimination by initiating nondiscriminatory rates.

3. The initiation of rates rests with the carriers in such a case. *Int. Com. Com.* v. *Louisville & N. R. Co.*, 227 U. S., 88, 92. When the rates are duly filed and published, the only question open is whether such rates comply with the Commission's order, and that fact is not questioned in this case. The carrier is restrained from applying them because they do

comply, the carriers having exercised their option to raise the lower rates to the level of the interstate rates.

The court below in its opinion said, Rec. pp. 110, 115:

> Behind unjust discrimination there always exists unreasonable—that is, unjust and unfair—rates; therefore *the sole remedy* for unjust discrimination lies in the *establishment of reasonable rates. Unreasonable rates being the cause and unjust discrimination the effect,* the authority to remove unjust discrimination is to be measured by the authority to prescribe reasonable rates. Every appeal to a commission seeking the termination of discrimination is, in effect, a prayer for the establishment of reasonable rates. * * * .
>
> As before stated, *unreasonable rates are the sole cause of unjust discrimination.* [Italics ours.]

The fallacy of this proposition is apparent from the fact, as above stated, that the Commission has no power to fix a maximum rate unless it finds an existing rate unreasonable. If it finds a rate unreasonable it may reduce the higher rate, as is frequently done, and thus remove the unjust preference. Where the higher rate is found to be reasonable, the lower rate of course must be reasonable to the public. The proposition of the state supreme court would make it impossible in many cases for the Commission to prevent discrimination. But in *Int. Com. Com.* v.

Baltimore & Ohio R. Co., 145 U. S., 263, 277, this Court said:

> We agree, however, with the plaintiff in its contention that a charge may be perfectly reasonable under section 1, and yet may create an unjust discrimination or an unresaonable preference under sections 2 and 3.

The Supreme Court of South Dakota clearly erred in its conclusion of law upon this point. The power to declare a discrimination unjust, and to order a carrier to cease discrimination, does not depend upon a finding that the rates are or either of them is unreasonably high. Nor does the law require the Commission to adopt or approve the rates which a carrier puts in for the purpose of complying with such an order. As stated, the only question that could be raised regarding the new schedule is whether the rates comply with the order; that is, whether or not they remove the discrimination. If the carrier goes beyond the scope of the order and raises rates which have not been found by the Commission to be unjustly preferential, to that extent the rates would not be justified or sanctioned by the order. No such claim is made in this case. The decree goes to the whole schedule and not to any part of it. It follows, therefore, that the fact that no order was entered by the Commission "approving or adopting" the schedule of rates proposed does not justify the interposition of the state court.

II.

THE INTERSTATE COMMERCE COMMISSION'S ORDER IS SUFFICIENTLY DEFINITE.

The Supreme Court of South Dakota, Rec. p. 108, said:

> The Commission failed to prescribe what "points" in South Dakota its order should apply to, nor did it make any finding as to what portion of the lines over which defendants did business were in territory commercially tributary to Sioux City.

The express companies operate over lines of railroad. They do not furnish the physical facilities for the movement of the traffic, those being furnished by the railroad companies. The rail carrier transports the express company's car or the car in which express matter is carried. But the express company, in transacting its business, is just as much confined to the line of rails and the stations thereon as is a rail carrier.

The Commission in its report, expressly made a part of the order, Rec. pp. 35, 37, said:

> The parties defendant are the American Express Company, which operates between Sioux City and points in South Dakota over the lines of the Chicago & Northwestern Railway Company and of the Chicago, St. Paul, Minneapolis & Omaha Railway Company, and Wells Fargo & Company, which operates between Sioux City and South Dakota points over the Chicago, Milwaukee & St. Paul Railway Company, * * * .
>
> The southeastern section of South Dakota is thus a natural and important trade territory

for Sioux City shippers whose principal competitors within the State are located at Sioux Falls, Mitchell, Aberdeen, and Watertown. Competition with dealers located at Yankton in the sale of ice cream is also shown.

The competitive points are the stations on the specified lines of railroad in the southeastern section of the State, not, as enumerated by the Supreme Court of South Dakota, Rec. pp. 116, 117, "every other nook and corner of the State." The order requires the preference to be abated where the distances between Sioux City, Iowa, and Sioux Falls and the other cities named, to stations in the southeastern section of the State on these railroads, are substantially equal. This order follows the order in the *Shreveport case*, 234 U. S. 342, 348, where the description refers to the railroad company and to "points on its line intermediate thereto" and "toward said Shreveport for an equal distance." The points of destination were not named in the Shreveport order, but comprehended the stations to which traffic was delivered. The designation in the Commission's order in this case of the points of destination leaves nothing uncertain "to be determined by the carriers." The rates are to be equalized between the competing cities and the points, or stations, upon the lines of the railroads over which these express companies operate, *where the distances are substantially the same*. This is definitely fixed by the mileages on the railroads, which are determinable as established facts. The report of the Commission is made a part

of the order, and the order must be construed in connection with the report. It is therefore submitted that this objection is without merit.

III.

THE SUPREME COURT OF SOUTH DAKOTA HAS NO JURISDICTION TO ANNUL AN ORDER OF THE INTERSTATE COMMERCE COMMISSION.

This objection was presented to the state court and was answered as follows, Rec., p. 109:

> There are two answers to this contention: (1) This is not an action to "suspend or set aside" the order of the Commission but one to enjoin the putting into effect of a schedule of rates, neither prepared nor approved by the Commission and clearly not authorized by it, which schedule defendants are seeking to put into force in direct violation of the laws of this State. (2) If the purported order of the Commission does, in any respect, regulate intrastate commerce, *it is to that extent void owing to the Commission's want of jurisdiction over the subject matter.* [Italics ours.]

1. By the act of Congress creating the Commerce Court, 36 Stat., 539, 540, 543, it is provided that the Commerce Court—

> shall have the jurisdiction now possessed by circuit courts of the United States and the judges thereof over all cases of the following kinds: * * *
>
> Second. Cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission * * *.

> *The jurisdiction* of the Commerce Court over cases of the foregoing classes *shall be exclusive;* * * *. [Italics ours].
>
> Sec. 4. That all cases and proceedings in the Commerce Court * * * shall be brought by or against the United States * * *
>
> Sec. 5. That the Attorney General shall have charge and control of the interests of the Government in all cases * * *.

By the same statute the Commission is given the right to intervene. By subsequent act of Congress, 38 Stat., 219, the Commerce Court was abolished—

> and the jurisdiction vested in said Commerce Court by said act is transferred to and vested in the several district courts of the United States * * *.
>
> The venue of any suit heretofore brought to enforce, suspend, or set aside, in whole or in part, any order of the Interstate Commerce Commission shall be in the judicial district wherein is the residence of the party or any of the parties upon whose petition the order was made * * *. The procedure in the district courts in respect to cases of which jurisdiction is conferred upon them by this act *shall be the same* as that heretofore prevailing in the Commerce Court. [Italics ours.]

Then follows a provision that in all such cases, upon application for a temporary injunction and on final hearing the district judge shall call to his assistance two additional judges, one of whom shall be a circuit judge, to hear the motion and the case.

2. The Supreme Court of South Dakota says that "the purported order of the Commission" *is void* in so

far as it affects intrastate commerce, for "want of jurisdiction over the subject matter." There is no claim that the Commission does not have jurisdiction to determine whether unjust discrimination exists, but it is claimed that it has no jurisdiction over the particular discrimination under consideration, that is, discrimination caused by state-made rates.

After reviewing the decisions of this Court in the *Minnesota Rate cases* and the *Shreveport case*, the court below observed, Rec., pp. 115, 116:

> The reasonableness, as intrastate rates, of the rates established by the Board is unquestioned; it must stand absolutely conceded for the purposes of this case as it had to be conceded before the Commission. The Commission had no power to pass on that question * * *. The intrastate rates being conceded to be reasonable as intrastate rates, there can be no unjust discrimination traceable thereto. * * *.
>
> We feel confident that, upon further consideration of these most important questions, the Supreme Court will recede, if not from the position it took in the *Minnesota case* in regard to the extent of the Federal authority over interstate commerce, at least from the position it took in the *Shreveport case* in regard to the proper construction to be given to the act to regulate commerce. Moved by such confidence, *we deem it our duty to hold the order of the Commission*, if subject to the construction given it by defendants, *to be absolutely void* owing to lack of authority in the Commission to make any such an order. [Italics ours.]

Here is a direct ruling by the state court that the order of the Commission, directing the plaintiffs in error to remove this discrimination, is void because the Commission can not fix intrastate rates. The court thereupon enjoins the carriers from complying with the order on the ground that it is void for the reason stated. This clearly constitutes an annulment of the order, since it makes the order ineffective as to all the interstate carriers therein named. Nothing is left upon which the order may operate. The court, throughout its opinion, deals with no other questions than those of power to make the order, the Commission's jurisdiction, and the superior authority of the State over the interstate carriers in all matters affecting intrastate rates, and disposes of the case upon its construction of these federal questions. It admits that the federal act, as construed by this Court, is absolutely contrary to the position which it assumes, and concludes, Rec., p. 116:

> If, however, this case shall reach the Supreme Court *and it shall adhere to its decisions* in the *Minnesota* and *Shreveport cases*, we shall cheerfully bow to its supreme authority and abide thereby. [Italics ours.]

3. *A complete remedy has been provided by Congress.* In the general scheme for regulating interstate commerce, Congress established the Commission and conferred upon it the power to determine the reasonableness of interstate rates and questions of undue preferences by interstate carriers. This court, in *Illinois Central R. Co.* v. *Int. Com. Com.*, 206 U. S.,

441, 454, speaking through Mr. Justice McKenna, observed that—

> the findings of the Commission are made by law *prima facie* true. This court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience.

This conclusion was reaffirmed in *Int. Com. Com.* v. *Union Pacific R. Co.*, 222 U. S., 541, 547.

A direct court review was provided in the Commerce Court act, which was subsequently devolved upon the district courts of the United States.

In *Int. Com. Com.* v. *Louisville & N. R. Co.*, 227 U. S., 88, 92, this Court, speaking through Mr. Justice Lamar, said:

> The statute, instead of making its orders conclusive against a direct attack, expressly declares that "they may be suspended or set aside by a court of competent jurisdiction." 36 Stat., 539 (15). Of course, that can only be done in cases presenting a justiciable question. But whether the order deprives the carrier of a constitutional or statutory right; * * * or whether, *for any reason, the order is contrary to law*—are all matters within the scope of judicial power. [Italics ours.]

As we have seen, the statute creating the Commerce Court vested in that court the jurisdiction to hear cases for the purpose of annulling the orders of the Commission, in whole or in part, and provided that the jurisdiction of that court for that purpose *should be exclusive*. "It is competent for Congress to make the judicial power of the United States ex-

clusive in all cases to which it extends." *Martin* v. *Hunter*, 1 Wheat., 304, 397; *Railroad Co.* v. *Whitton*, 13 Wall., 270, 288; *The Moses Taylor*, 4 Wall., 411, 429; *Tennessee* v. *Davis*, 100 U. S., 257; *Plaquemines Tropical Fruit Co.* v. *Henderson*, 170 U. S., 511, 517.

Referring to sections 8 and 9 of the act to regulate commerce, this court, in *Pennsylvania R. Co.* v. *Sonman Shaft Coal Co.*, 242 U. S., 120, 123, speaking through Mr. Justice Van Devanter, said:

> If the act said nothing more on the subject it well may be that no action for damages resulting from a violation of the act *could be entertained by a state court.* [Italics ours.]

It is to be observed, therefore, that a complete remedy is provided by the federal law, in a federal court, for reviewing an order of the Commission "for any reason." This includes the determination of whether or not the Commission in entering such order has exceeded its jurisdiction.

4. Such a proceeding was instituted in the United States District Court for the Northern District of Iowa, Western Division. The defendants in error knew of this proceeding, their attorney being present at the hearing on the application for a temporary injunction. Rec., pp. 28–29. The State and the Board were parties before the Commission and took part in the proceedings before the Commission. Under the Commerce Court act referred to, the State and the Board had the right to intervene in all proceedings in the district court to set aside this order of the Commission.

Section 5 of the Commerce Court act, 36 Stat., 543, provides that—

> any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties thereto of their own motion and as of right, and be represented by their counsel, in any suit wherein is involved the validity of such order or requirement or any part thereof, and the interest of such party; * * *.

It will be seen, therefore, that the federal act making the direct proceeding the test of the validity of an order in the federal court exclusive, carefully guards and protects the rights of all parties directly interested in the order. The defendants in error, disregarding the provisions of the federal act, chose to go into a state court and there attack the order.

5. The proceeding in the state supreme court, while in form a collateral attack upon the order of the Commission, was actually a direct attack upon that order. The opinion of the court below deals exclusively with the order and with its validity, construing the federal act and limiting the jurisdiction of the Commission in passing upon questions of discrimination as announced by this Court. In *Houston East & West Texas Ry. Co.* v. *United States*, 234 U. S., 342, 354 this court said:

> It is immaterial, so far as the protecting power of Congress is concerned, that the discrimination arises from intrastate rates as compared with interstate rates. * * * Nor can the attempted exercise of state authority

> alter the matter where Congress has acted, for a State may not authorize the carrier to do that which Congress is entitled to forbid *and has forbidden*. [Italics ours.]

The Commission had jurisdiction over plaintiffs in error, they being carriers subject to the act to regulate commerce; it had jurisdiction of the subject matter; and, having full power to enter the order, it is not subject to collateral attack except as to jurisdiction. *Cocke* v. *Halsey*, 16 Pet., 71; *Philadelphia, etc., R. Co.* v. *Stimpson*, 14 Pet., 448, 458; *Supervisors* v. *U. S.*, 4 Wall, 435; *Michaels* v. *Post*, 21 Wall., 398; *Secombe* v. *Railroad Co.*, 23 Wall., 108; *Santiago* v. *Nogueras*, 214 U. S., 260; *United States* v. *Morse*, 218 U. S., 493; *Briscoe* v. *Rudolph*, 221 U. S., 547.

This rule applies to judgments of all tribunals acting within their jurisdiction, *Wilcox* v. *Jackson*, 13 Pet., 496; to orders of a board of equalization, *Western Union Telegraph Co.* v. *Gottlieb*, 190 U. S., 412; to decisions by the Land Department, *Sanford* v. *Sanford*, 139 U. S., 642, 646, and *Weeks* v. *Bridgman*, 159 U. S., 541.

> It is a universal principle, that, where power or jurisdiction is delegated to any public officer or tribunal over a subject matter, and its exercise is confided to his or their discretion, the acts so done are binding and valid as to the subject matter; and individual rights will not be disturbed collaterally for anything done in the exercise of that discretion within the authority and power conferred. [*United States* v. *Arredondo*, 6 Pet., 690, 728.]

To the same effect are *Voorhees* v. *Jackson*, 10 Pet., 449; *Sabariego* v. *Maverick*, 124 U. S., 261; *United States* v. *California Land Co.*, 148 U. S., 31; *United States* v. *Dalles, etc., Co.*, 148 U. S., 49.

Judgments of federal courts can not be attacked collaterally. *Deposit Bank* v. *Frankfort*, 191 U. S., 499. This does not apply where there is no jurisdiction. *Ex Parte Terry*, 128 U. S., 289; *Noble* v. *Union River Logging Co.*, 147 U. S., 165. But this rule has limitations. *Windsor* v. *McVeigh*, 93 U. S., 274; *United States* v. *Walker*, 109 U. S., 258. The federal statute, section 15, clearly gives the Commission jurisdiction over all questions of undue preference and advantage; and this Court, in the *Shreveport case*, held that this jurisdiction extended to preference caused by state-made rates. The Commission therefore had jurisdiction of the parties and of the subject matter, and the order could not be attacked collaterally. The law is settled as to the Commission's jurisdiction.

If it is established that state courts may issue injunctions against carriers subject to the act to regulate commerce to prevent their complying with the orders of the Commission, where a direct review of those orders is provided in the federal courts, the efficiency of the Commission in administering this law will be seriously crippled. Such a ruling would make the state law and its tribunals superior to the federal law and its tribunals.

The federal act has thrown around its administration every protection against the Commission's ex-

ceeding its power or acting arbitrarily. In making these provisions it has also protected the public interests by the express provisions of the statute vesting in the district courts of the United States jurisdiction over cases involving such questions and providing that such suits shall be brought against the United States and be under the supervision of the Attorney General of the United States. Notwithstanding these provisions, called expressly to the attention of the Supreme Court of South Dakota, Rec., p. 109, that court proceeded against the carriers who had filed tariffs to comply with the order of the Commission, without notifying the United States, the Attorney General, or the Commission, and declared an order of the Commission void and enjoined the carriers subject to that order from complying therewith, on the ground that it was void. The decree of the state court, Rec., p. 89, speaks in no uncertain terms. These carriers who had been ordered by the Commission to remove an unlawful preference and advantage in favor of certain cities in South Dakota, and who had published rates to comply with that order, are—

> enjoined and restrained from putting into effect or applying on intrastate transportation of property by express between any points in the State of South Dakota rates, fares, charges, classifications, rules, regulations, or practices that will result in rates, fares, and charges greater or higher than the maximum rates or charges * * * specified and contained in the order made and entered by the Board of

> Railroad Commissioners of said State * * * unless or until a schedule of express rates shall * * * have been regularly approved and allowed by said Board in conformity to the laws of the State of South Dakota. [Rec., p. 90.]

The state law is made supreme over the federal, and the action of the Board superior to that of the Commission in regulating the conduct of interstate carriers. It is respectfully submitted that this decree and the opinion supporting it are in violation of the Constitution and the laws of the United States.

IV.

THE MINNESOTA RATE CASES, 230 U. S., 352.

In the *Minnesota Rate cases*, 230 U. S., 352, 419, the railroads pressed upon the attention of this Court that the state rates were lower than many interstate rates, and that undue or unreasonable preferences or advantages might accrue to localities within the State in violation of section 3. This Court put this question to one side by stating that such a fact, if it existed, would have to be first determined by the Interstate Commerce Commission, and that no such finding had been made.

The question here involved, in the order in the case at bar, was not in the *Minnesota Rate cases*. Those cases dealt with the power of the State to establish and fix intrastate rates as an orignal proposition without reference to the question of the effect of unjust preferences and advantages. The Supreme Court of South Dakota quotes passages from those cases upon the question then under consideration, as though the

fixing of intrastate rates involved the determination of discriminations and preferences under sections 2 and 3 of the federal act. To make its claim logical it went to the extreme of holding, as we have already stated, that there could be no unjust discrimination if the rates were reasonable, and that therefore the fixing of reasonable rates determined the question of discrimination and preference.

It has not been claimed that under the act to regulate commerce Congress has undertaken to fix intrastate rates; and certainly the Commission in its order under consideration did not attempt to do so. The power to fix intrastate rates under present legislation undoubtedly rests with the State, with this limitation, however, that state-made rates may not create unjust or unreasonable preferences or advantages in favor of cities in one State against cities over the state line that are served by the same interstate carriers under interstate rates. The language of this Court in the *Shreveport case* is clear and explicit upon this point.

V.

THE SHREVEPORT CASE, 234 U. S., 342.

The opinion in this case requires no exposition. Its declaration that, in cases of conflict between federal and state authority, the federal authority is supreme rests upon the constitutional provision that the Constitution and laws passed thereunder shall be the supreme law of the land. This provision settles all conflict of laws between the States and the Federal Government. Rate making is not the only point of contact. The State alone exercises the

police power within the State; but there is a long line of decisions holding that in the exercise of that undoubted power a State may not unreasonably burden interstate commerce. There is no greater power of a sovereign State than that of taxation, and yet, in the exercise of this power any tax laid by a State upon interstate commerce is void. Rates fixed by state authority are no more sacred than the police or taxing powers; and when state rates create unjust and unreasonable preferences in favor of the cities of one State as against cities in other States, and are in violation of the federal law which seeks to prevent such discrimination, this exercise of power must fall before what the people of all the States have declared shall be the supreme law of the land. It is no answer to say that rates for a given traffic for substantially the same distance, under like circumstances and conditions, fixed by state authority, are more reasonable than interstate rates on the same traffic for similar distances and conditions fixed by the Commission. There is no exact standard. As was said by this court in *Int. Com. Com.* v. *Union Pacific R. Co.*, 222 U. S., 541, 550:

> Rate experts of acknowledged ability and fairness, and each acting independently of the other, may not have reached identically the same conclusion. We do not know whether the results would have been approximately the same. For there is no possibility of solving the question as though it were a mathematical problem to which there could only be one correct answer.

CONCLUSION.

We do not question the ability or fairness of the Board in fixing intrastate rates from Sioux City and the other points to competing points in South Dakota, although how they reached the conclusion that express rates, which include "pick up" and delivery service should be lower in many instances than first class freight rates for the same distance is not explained. Nor can the ability and fairness of the Commission in fixing interstate rates for like distances from Sioux City, Iowa, to those competitive points be questioned. The rates *are* substantially different, and result as the Commission has found, in unjust and unreasonable preference and advantage to the South Dakota cities. This brings about a conflict which calls for the determination of whether the federal or the state authority shall prevail. This question was answered by this Court in the *Shreveport case* in the following language, p. 360:

> But it was recognized at the beginning that the Nation could not prosper if interstate and foreign trade were governed by many masters, and where the interests of the freedom of interstate commerce are involved, the judgment of Congress and of the agencies it lawfully establishes must control.

We respectfully submit that the decree of the Supreme Court of South Dakota should be reversed and that the bill should be dismissed.

JOSEPH W. FOLK,
CHARLES W. NEEDHAM,
As Amici Curiae, on behalf of the Interstate Commerce Commission.

○

BRIEF FOR PLAINTIFFS IN ERROR

Supreme Court of the United States

OCTOBER TERM, 1916

No. 902.

AMERICAN EXPRESS COMPANY AND GEORGE C. TAYLOR, INDIVIDUALLY AND AS PRESIDENT OF THE AMERICAN EXPRESS COMPANY, AND WELLS FARGO & COMPANY, PLAINTIFFS IN ERROR,

vs.

STATE OF SOUTH DAKOTA *EX REL.* CLARENCE C. CALDWELL, AS ATTORNEY GENERAL OF THE STATE OF SOUTH DAKOTA, AND JOHN J. MURPHY, P. W. DOUGHERTY AND WILLIAM G. SMITH, AS AND CONSTITUTING THE BOARD OF RAILROAD COMMISSIONERS OF THE STATE OF SOUTH DAKOTA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA.

T. B. HARRISON,
BRANCH P. KERFOOT,
C. O. BAILEY,
J. H. VOORHEES,
for Plaintiffs in Error.

C. W. STOCKTON,
Of Counsel.

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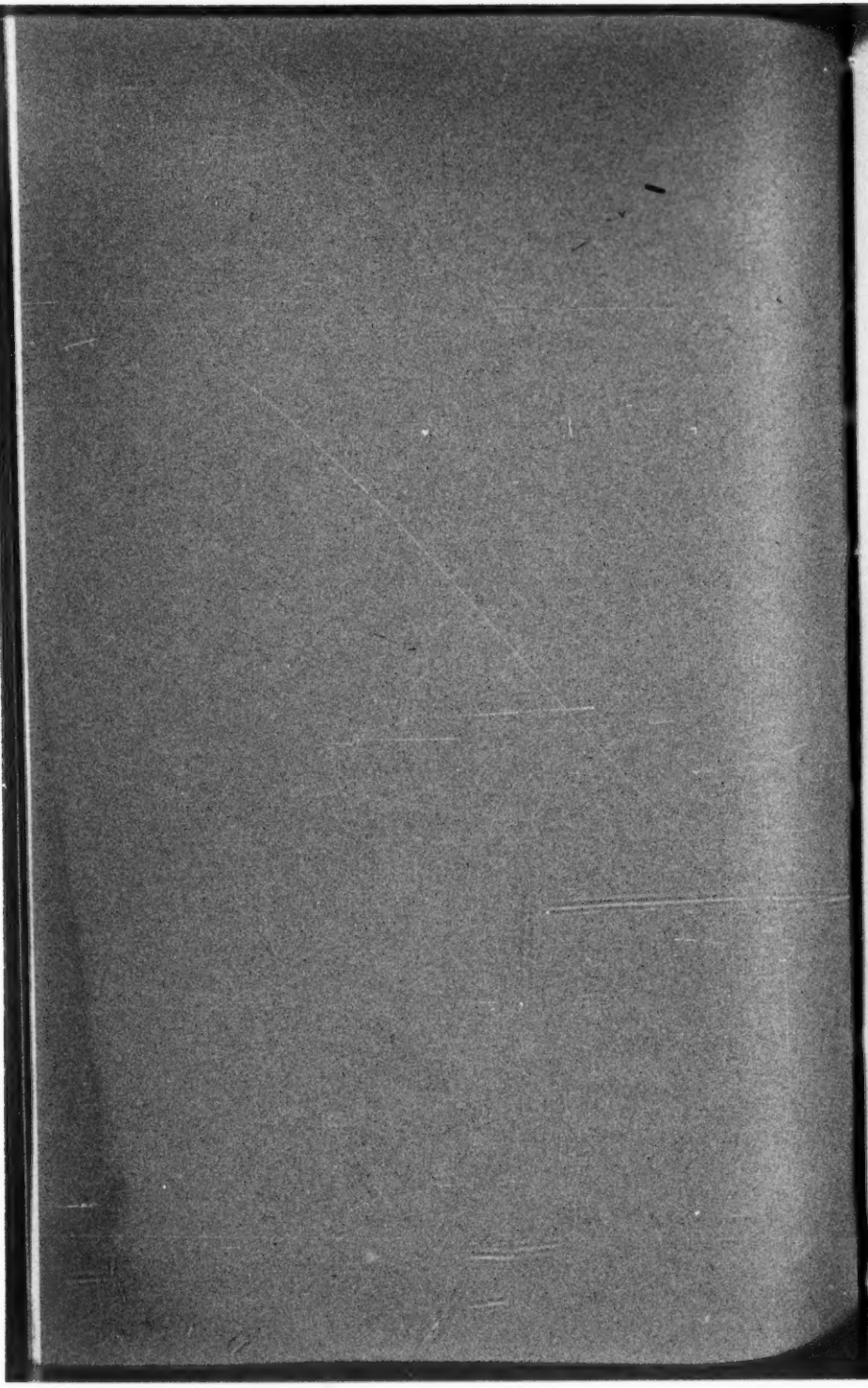

INDEX.

CASES CITED.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 902.

AMERICAN EXPRESS COMPANY AND GEORGE C. TAYLOR, INDIVIDUALLY AND AS PRESIDENT OF THE AMERICAN EXPRESS COMPANY, AND WELLS FARGO & COMPANY, PLAINTIFFS IN ERROR,

vs.

STATE OF SOUTH DAKOTA *EX REL.* CLARENCE C. CALDWELL, AS ATTORNEY GENERAL OF THE STATE OF SOUTH DAKOTA, AND JOHN J. MURPHY, P. W. DOUGHERTY AND WILLIAM G. SMITH, AS AND CONSTITUTING THE BOARD OF RAILROAD COMMISSIONERS OF THE STATE OF SOUTH DAKOTA.

BRIEF AND ARGUMENT FOR PLAINTIFFS IN ERROR.

This is an original action, commenced in the Supreme Court of the state of South Dakota, in the name of that state on the relation of its Attorney General and Board of Railroad Commissioners against plaintiffs in error, to enjoin the putting into effect of certain express rates. To reverse a judgment granting a permanent injunction, this writ of error has been sued out. The facts involved in this suit are as follows:

STATEMENT OF FACTS.

In 1911 the Board of Railroad Commissioners of the state of South Dakota, pursuant to a statute of that state, promulgated a schedule of maximum charges for the transportation of express freight instrastate in South Dakota. This schedule was made upon a distance basis. It was known as South Dakota Express Distance Tariff No. 2 and is still in force in that state. (Transcript pp. 3, 24, 32.)

In the year 1912, the Interstate Commerce Commission entered upon an investigation of express rates, practices, accounts and revenues. The result of this investigation was the promulgation by the Interstate Commerce Commission of a zone and block system of express rates whereby the rates for the interstate transportation of property by express throughout the United States were placed upon a uniform basis. The zone and block rates

were put into effect by the express companies February 1, 1914, and, excepting as subsequently modified by the Interstate Commerce Commission, remain in effect. (24 ICC Rep. 380. 28 ICC Rep. 131. 35 ICC Rep. 3.)

In 1914, and after the Interstate Commerce Commission rates had been put into effect, the Traffic Bureau of the Sioux City Commercial Club filed with the Interstate Commerce Commission its petition against plaintiffs in error, the American Express Company and Wells Fargo & Company, in which petition the rates for transportation by express between Sioux City and points in the state of South Dakota were attacked as unreasonably prejudicial and disadvantageous to Sioux City. These allegations of undue prejudice and disadvantage were predicated upon a comparison with the express rates applicable between Sioux Falls, Aberdeen, Watertown, Mitchell and Yankton and points in the state of South Dakota. Relief was asked that an order be entered requiring the express companies to publish and maintain express rates between Sioux City and South Dakota points which are no higher than those contemporaneously maintained for substantially the same distances between the South Dakota cities, competing with Sioux City in the South Dakota territory, and other points in the state. (Transcript p. 25.)

The state of South Dakota, the Attorney General and the Board of Railroad Commissioners of that state, and the commercial clubs of Sioux Falls, Aberdeen, and Mitchell intervened in the Sioux City case before the Interstate Commerce Commission. Hearings were had and evidence taken upon the part of the complainant, the defendants and the intervenors. The case was argued November 20, 1915, before the Interstate Commerce Commission and a decision was announced May 23, 1916. (Traffic Bureau of the Sioux City Commercial Club vs. American Express Company, et al, 39 ICC Rep. 703.) In its opinion the Interstate Commerce Commission arrived at the following conclusion:

"This Commission had not then made the exhaustive investi-
"gation of the express rates which has since been completed, Ex-
"press Investigation, *supra*. We are here under no doubt as to
"how the unjust discrimination found to exist should be correct-
"ed, for the record conclusively shows that the South Dakota
"rates are too low to be made the measure of interstate rates be-
"tween Sioux City and South Dakota points, while there is no
"proof that the rates which this Commission has approved are
"unreasonable, nor has a basis been laid for a modification of
"our order.

"We accordingly find:

"(1) That rates for the interstate transporation of shipments "by express between Sioux City, Iowa, and points in the state of "South Dakota heretofore prescribed by us as reasonable have "not been shown to be unreasonable.

"(2) That the defendants maintain higher interstate "rates between Sioux City, and points in the state of South Da-"kota, than between Sioux Falls, Mitchell, Aberdeen, Watertown, "and Yankton, S. Dak., and points in the same state applicable "to shipments by express which are transported under substan-"tially similar circumstances and conditions.

"(3) That thereby an undue preference is given to Sioux "Falls, Mitchell, Aberdeen, Watertown, and Yankton, and an un-"due and unreasonable prejudice and disadvantage is effected "against Sioux City.

"(4) That the defendants should cease and desist from con-"tinuing said undue preference and unjust discrimination.

"An appropriate order will be entered."

The order made by the Interstate Commerce Commission provided as follows:

"IT IS ORDERED, That the above-named defendants, accord-"ing as they participate in the transportation, be, and they are "hereby, notified and required to cease and desist, on or before "August 15, 1916, and thereafter to abstain, from publishing, "demanding, or collecting higher rates for the transportation of "shipments by express between Sioux City, Iowa, and points in "the state of South Dakota, than are contemporaneously publish-"ed, demanded, or collected for transportation under substantially "similar circumstances and conditions for substantially equal "distances between Sioux Falls, Mitchell, Aberdeen, Watertown, "and Yankton, S. Dak., on the one hand, and said points in the "state of South Dakota on the other which said relation of rates "has been found by the Commission to be unjustly discrimina-"tory.

"AND IT IS FURTHER ORDERED That this order shall con-"tinue in force for a period of not less than two years from the "date when it shall take effect." (Transcript pp. 54-55.)

The Interstate Commerce Commission subsequently modified its order by extending the time for the express companies to remove the discrimination in rates from August 15, to September 15, 1916.

The express companies prepared and filed with the Interstate Commerce Commission tariffs, complying with its

order, by which tariffs the rates between Sioux Falls, Mitchell, Aberdeen, Watertown and Yankton, and other points in South Dakota, were made the same as from Sioux City to points in South Dakota for substantially equal distances, and as to all other South Dakota intrastate traffic the rates fixed by the South Dakota Distance Tariff No. 2 were left in effect. In other words, the tariffs filed by the express companies made no change whatever in the South Dakota intrastate rates except such as were necessary to comply with the order of the Interstate Commerce Commission. These tariffs were also sent to the South Dakota Railroad Commission but that Commission refused to accept or file them. (Transcript pp. 27-28.)

On August 28, 1916, the Brown Drug Company and other wholesalers, jobbers and manufacturers of Sioux Falls, together with the Commercial Clubs of Sioux Falls, Mitchell, Watertown, Aberdeen and Yankton, filed in the District Court of the United States, for the Western Division of the Northern District of Iowa, their petition against the United States of America, the Interstate Commerce Commission, the express companies and the Sioux City Commercial Club. This suit was brought to suspend, set aside and enjoin the order of the Interstate Commerce Commission in the Sioux City case. A motion for an interlocutory injunction was made by the plaintiffs and this motion was heard by United States Circuit Judge Walter I. Smith and United States District Judges Henry T. Reed and Martin J. Wade, at Cedar Rapids, Iowa, on September 7th and 8th. At the conclusion of the hearing the court denied the motion for an injunction. (Brown Drug Co. vs. United States, 235 Fed. 603. Transcript pp. 28, 73, 83-84.)

On September 12, 1916, the complaint in this suit was filed in the Supreme Court of the state of South Dakota and upon the ex parte application of the defendant in error there was issued an order upon the plaintiffs in error to show cause why an interlocutory injunction be not issued. This order to show cause contained a temporary restraining order prohibiting the express companies from putting into effect the rates ordered by the Interstate Commerce Commission until after the hearing and determination of the motion for an interlocutory injunction. (Transcript pp. 11, 13.) While this temporary restraining order remained in effect the case was brought on for final hearing in the Supreme Court of the state of South Dakota on October 1, 1916, and upon December 4, 1916, a final judgment was entered granting a permanent injunction against

the putting into effect of the rates provided by the order of the Interstate Commerce Commission. (Transcript pp. 89-90.) To reverse this judgment, this writ of error has been sued out. (Transcript pp. 91-97, 106-118.)

The contention of the plaintiffs in error is that the order made by the Interstate Commerce Commission was an order within the jurisdiction and authority of the Commission and that no grounds exist why it should be set aside or why its operation should be enjoined. It is further contended that under the provisions of the act creating the commerce court (Sections 200-214 Judicial Code) and under the act of October 2, 1913, (Part 1, Vol. 38, Stat. at L. pp. 219-221), the district courts of the United States are given exclusive jurisdiction of all "suits to enjoin, set aside, annul or suspend any order of the Interstate Commerce Commission" and that consequently the Supreme Court of the state of South Dakota possessed no jurisdiction to entertain this action or to grant an injunction against the enforcement of the order made in the Sioux City case by the Interstate Commerce Commission.

The plaintiffs in error are in this situation: They have been ordered by the Interstate Commerce Commission to cease making certain discriminations in express rates in South Dakota. If they do not comply with this order, they are subject to the penalties, provided by Section 16 of the Act to Regulate Commerce, of five thousand dollars per day. They have been enjoined by the Supreme Court of South Dakota from complying with the order of the Interstate Commerce Commission and cannot obey the order of the Commission without being in contempt of the South Dakota Supreme Court. The federal statute confers upon the district courts of the United States exclusive jurisdiction in cases brought to enjoin the operation of an order of the Interstate Commerce Commission but the Supreme Court of South Dakota has held, that notwithstanding this statute, it possesses the authority to issue an injuction restraining compliance with an order of the Commission. Plaintiffs in error are between Scilla and Charybdis. If they comply with the order of the Interstate Commerce Commission they place themselves in contempt of the Supreme Court of the state of South Dakota. If they do not comply with the order, they are subject to the penalties of five thousand dollars per day prescribed by the sixteenth section of the Act to Regulate Commerce.

In its opinion in this case the Supreme Court of South Dakota expressly declined to follow the decisions of this court in

the Minnesota Rate Cases (230 U. S. 352) and in the Shreveport case (234 U. S. 342), making the declaration that:

"We feel confident that, upon further consideration of these "most important questions, the Supreme Court will recede, if not "from the position it took in the Minnesota case in regard to the "extent of the federal authority over interstate commerce, at least "from the position it took in the Shreveport case in regard to the "proper construction to be given to the Act to Regulate Com-"merce. Moved by such confidence, we deem it our duty to hold "the order of the Commission, if subject to the construction given "it by defendants, to be absolutely void owing to lack of author-"ity in the Commission to make any such an order. If, however, "this case shall reach the Supreme Court and it shall adhere to "its decisions in the Minnesota and Shreveport cases, we shall "cheerfully bow to its supreme authority and abide thereby." (Transcript p. 116.)

From the foregoing statement of facts it appears that the issue involved in this suit group themselves around two main propositions, viz:

1. The jurisdiction of the South Dakota Supreme Court to entertain this suit.

2. The jurisdiction of the Interstate Commerce Commission to make the order in controversy in this suit.

ARGUMENT.

FIRST POINT.

As to the jurisdiction of the Supreme Court of South Dakota to entertain this suit. The determination of this question involves a consideration of the statutes enacted by Congress relating to the jurisdiction of the courts over matters relating to commerce.

The Commerce Court was established by an act entitled, "An Act to Codify, Revise and Amend the Laws Relating to the Judiciary" approved March 3, 1911, (36 Stat. at L. pp. 1087-1168). By Section 207 of this Act it was provided:

"The Commerce Court shall have the jurisdiction possessed "by Circuit Courts of the United States and the judges thereof "immediately prior to June 18, 1910, over all cases of the fol-"lowing kinds. * * * * Second, cases brought to enjoin, "set aside, annul or suspend, in whole or in part, any order of "the Interstate Commerce Commission. * * * * The jur-"isdiction of the Commerce Court over cases of the foregoing "classes shall be *exclusive*."

By Section 208 of the Act the procedure in suits to enjoin, set aside, annul or suspend any order of the Interstate Commerce Commission is laid down. It is provided that such suits shall be brought against the United States, and rather drastic restrictions are imposed upon the power of the court to grant interlocutory injunctions.

The Commerce Court was abolished by the act entitled, "An Act Making Appropriations to Supply Urgent Deficiencies for the Fiscal Year 1913, and for the other Purposes," approved October 22, 1913, (38 Stat. at L. pp. 209-233). By this Act it is provided that, "The jurisdiction vested in said "Commerce Court "by said Act is transferred to and vested in the several District "Courts of the United States." It is also provided that, "The "venue of any suit hereafter brought to enforce, suspend or "set aside, in whole or in part, any order of the Interstate Com-"merce Commission shall be in the Judicial District wherein "is the residence of the party or any of the parties upon whose "petition the order was made". It is further provided that, "The procedure in the District Courts in respect to cases of which "jurisdiction is conferred upon them by this Act, shall be the "same as that heretofore prevailing in the Commerce Court." There then follow provisions in regard to the issuance of interlocutory injunctions, and clauses providing that such injunctions shall not issue, excepting after a hearing by three judges, one of whom shall be a Circuit judge.

It will thus be seen that Congress has enacted that *exclusive jurisdiction* of all actions to enjoin, set aside, annul or suspend any order of the Interstate Commerce Commission, in whole or in part, shall be vested in the District Courts of the United States; that all such suits shall be brought against the United States as a party defendant, and that the venue shall be laid in the District of the residence of the party upon whose petition the order was made by the Interstate Commerce Commission.

Upon the hearing in this case in the Supreme Court of South Dakota, the point was raised by plaintiffs in error that exclusive jurisdiction over the subject matter of this suit was vested in the district courts of the United States, and that consequently the Supreme Court of South Dakota possessed no jurisdiction to entertain the case. (Transcript pp. 30-31.) The court held adversely to this proposition and, in passing upon the question of its jurisdiction, uses the following language. (Transcript p. 109):

"Defendants contend that this court has no jurisdiction of the "subject matter of this action, citing the provisions of Act of "Congress, October 22, 1913,—38 Stat. at L. p. 219—that,

" 'The venue of any suit hereafter brought to enforce, sus- " 'pend, or set aside, in whole or in part, any order of the Inter- " 'state Commerce Commission shall be in the (federal) judicial " 'district * * * * * '".

"There are two answers to this contention: (1) This is not "an action to 'suspend or set aside' the order of the Commission "but one to enjoin the putting into effect a schedule of rates, "neither prepared nor approved by the Commission and clearly "not authorized by it, which schedule defendants are seeking "to put into force in direct violation of the laws of this state. "(2) If the purported order of the Commission does, in any re- "spect, regulate intrastate commerce, it is to that extent void "owing to the Commission's want of jurisdiction over the sub- "ject matter."

"Having jurisdiction to act, should we permanently restrain "the establishment of the proposed rates?"

Our contention in this case is that the South Dakota Supreme Court has misapprehended the issues presented by the record in this case and has come to an erroneous conclusion as to the power vested by law in the Interstate Commerce Commission.

To our minds there can be no controversy as to the nature of this suit. The Interstate Commerce Commission, a tribunal established by Congress and given jurisdiction over the rates to be charged by common carriers, has duly made an order requiring the defendant express companies to do certain acts. This suit is brought to restrain them from complying with this order of the Interstate Commerce Commission. The suit is consequently nothing more nor less than a suit "to enjoin, set aside, annul or suspend, in whole or in part" an order of the Interstate Commerce Commission.

In many classes of cases the jurisdiction of the Federal and of the State courts is coextensive, but in certain classes of cases relating to matters over which jurisdiction is conferred upon Congress by the federal constitution, Congress has seen fit to restrict the jurisdiction to the federal courts. Illustrations of this are to be found in the laws respecting patents and trade marks, the admiralty laws, and the bankruptcy laws. Relating to each of these subjects there are many questions, jurisdiction over which is by law limited to the Federal courts. So in matters respecting the issuance of injunctions to suspend the opera-

tion of orders of the Interstate Commerce Commission, Congress has reserved exclusive jurisdiction in the United States District Court, and as to such matters the State courts possess no jurisdiction.

Further argument upon this proposition seems to us unnecessary. Commerce is a matter over which Congress possesses jurisdiction under the provisions of the federal constitution. The acts of Congress, so long as it is acting within its jurisdiction, are supreme. Congress has seen fit to enact that the *exclusive jurisdiction* to control orders of the Interstate Commerce Commission shall be vested in the Federal District courts, and by this Act the state courts are divested of all jurisdiction over such matters.

SECOND POINT.

The Supreme Court of South Dakota, in its opinion in this case, held that it possessed jurisdiction to entertain the case because:

"This is not an action to 'suspend or set aside' the order of "the Commission but one to enjoin the putting into effect of a "schedule of rates, neither prepared nor approved by the Com-"mission and clearly not authorized by it, which schedule de-"fendants are seeking to put into force in direct violation of the "laws of this state."

Our contention is that in this holding the South Dakota Supreme Court misapprehended the effect of the order of the Interstate Commerce Commission and also misconstrued the provisions of the Act to Regulate Commerce, respecting the making of orders by the Commission. That such is the situation will appear from a review of the facts concerning the promulgation by the Interstate Commerce Commission of the order in controversy.

In the year 1911 the Board of Railroad Commissioners of the state of South Dakota formulated the South Dakota Express Distance Tariff No. 2. (Transcript pp. 5, 32-34.) By this tariff the South Dakota first class express rates were very greatly lowered as compared to previously existing rates, and were lowered to such an extent that in many instances they were less than the first class freight rates. (Transcript pp. 37-38.)

The Interstate Commerce Commission put into effect a uniform system of zone and block rates for interstate commerce throughout the country, on February 1, 1914, which rates, excepting as subsequently slightly raised by the Interstate Com-

merce Commission remain in effect. (24 ICC Reports, 380. 28 ICC Reports, 131. 35 ICC Reports, 3.) The Interstate Commerce Commission rates were made upon a scale of graduated charges, while the rates prescribed by the South Dakota Distance Tariff No. 2 were based upon a distance basis alone. The result was, that while the charges upon express packages of small weights were in some instances less, under the ICC rates, than under the South Dakota state rates, the charges authorized on packages of greater weights were materially higher under the ICC rates than under the South Dakota state rates, and upon the basis of a 100 pound package, the ICC rates were considerably in excess of the rates prescribed by the South Dakota Express Distance Tariff No. 2. (Transcript pp. 38-41.)

The city of Sioux City is situated on the western line of the state of Iowa, just across the Big Sioux river, which forms part of the boundary line between South Dakota and Iowa. Sioux City is a jobbing center of considerable commercial importance, and the southeastern section of South Dakota is a natural and important trade territory for Sioux City jobbers whose principal competitors within the state of South Dakota are located at Sioux Falls, Mitchell, Aberdeen, Watertown and Yankton. (Transcript pp. 36-37.)

After the zone and block rates for interstate transaction by express, promulgated by the Interstate Commerce Commission, became effective, February 1, 1914, the Traffic Bureau of the Sioux City Commercial Club filed its complaint with the Interstate Commerce Commission attacking as unreasonable, and unduly and unreasonably prejudicial and disadvantageous to Sioux City, the rates for transportation by express between Sioux City, Iowa, and points in the state of South Dakota. The allegations of undue prejudice and disadvantage were predicated upon comparisons of express rates applicable between Sioux Falls, and other South Dakota cities, on the one hand, and points in that state on the other. Relief was asked that an order be entered requiring the American Express Company and Wells Fargo & Company, the defendants named in the complaint, to publish and maintain express rates applicable between Sioux City and South Dakota points which are no higher than those contemporaneously maintained for substantially the same distances between South Dakota cities such as Sioux Falls and other points in that state. (Transcript p. 35.)

The state of South Dakota, the Board of Railroad Commissioners of the state of South Dakota, the Commercial Clubs

of Sioux Falls, Mitchell, and Aberdeen, South Dakota, the Adams Express Company, and the Chicago and Northwestern Railway Company intervened in the case brought by the Traffic Bureau of the Sioux City Commercial Club before the Interstate Commerce Commission. Testimony was taken on behalf of the complainant, the defendants and the various intervenors, and the case was finally submitted to the Interstate Commerce Commission on November 20, 1915, and decided by the Commission May 23, 1916. (Transcript pp. 34-55.)

The Interstate Commerce Commission went exhaustively into the question of the discriminatory effect of the South Dakota state rates upon the interstate traffic between Sioux City and South Dakota points, and arrived at the following conclusions:

"We are here under no doubt as to how the unjust discrimi-"nation found to exist should be corrected, for the record con-"clusively shows that the South Dakota rates are too low to be "made the measure of interstate rates between Sioux City and "South Dakota points, while there is no proof that the rates "which this Commission has approved are unreasonable, nor "has a basis been laid for a modification of our order.

"We accordingly find:

"(1) That rates for the interstate transportation of ship-"ments by express between Sioux City, Iowa, and points in the "state of South Dakota heretofore prescribed by us as reason-"able have not been shown to be unreasonable.

"(2) That the defendants maintain higher interstate rates "between Sioux City and points in the state of South Dakota than "between Sioux Falls, Mitchell, Aberdeen, Watertown and Yank-"ton, S. Dak., and points in the same state applicable to ship-"ments by express which are transported under substantially "similar circumstances and conditions.

"(3) That thereby an undue preference is given to Sioux "Falls, Mitchell, Aberdeen, Watertown and Yankton, and an un-"due and unreasonable prejudice and disadvantage is effected "against Sioux City.

"(4) That the defendants should cease and desist from con-"tinuing said undue preference and unjust discrimination.

"An appropriate order will be entered."

The "appropriate order" entered by the Interstate Commerce Commission, pursuant to its findings, recited as follows:

"It is ordered, That the above-named defendants, according "as they participate in the transportation, be, and they are here-

"by notified and required to cease and desist, on or before August "15, 1916, and thereafter to abstain, from publishing, demand- "ing, or collecting higher rates for the transportation of ship- "ments by express between Sioux City, Iowa, and points in the "state of South Dakota, than are contemporaneously published, "demanded, or collected for transportation under substantially "similar circumstances and conditions for substantially equal "distances between Sioux Falls, Mitchell, Aberdeen, Watertown, "and Yankton, S. Dak., on the one hand, and said points in the "state of South Dakota, on the other, which said relation of rates "had been found by the Commission to be unjustly discrimina- "tory."

The Supreme Court of South Dakota, after quoting the order made by the Interstate Commerce Commission, says:

"The Commission made no order approving or adopting the "schedule of rates filed by defendants with the Board, nor any "order in any manner making such schedule its schedule, unless "the order above quoted had that effect."

The Court, after discussing the form of the order, comes to the following conclusion:

"This is not an action 'to suspend or set aside' the order of "the Commission, but one to enjoin the putting into effect of a "schedule of rates neither prepared nor approved by the Com- "mission and clearly not authorized by it, which schedule de- "fendants are seeking to put into force in direct violation of the "laws of this state."

The Supreme Court of South Dakota evidently overlooked the fact that the order of the Interstate Commerce Commission was a paraphrase of the language of the third section of the Act to Regulate Commerce, and that it was identical in its terms with the order of the Commission in the Shreveport case. (234 U. S. 347.)

There is nothing ambiguous about the order. The Interstate Commerce Commission found that the South Dakota state rates were too low to be made the measure of interstate rates between Sioux City and South Dakota points. It also found that no showing had been that the rates prescribed by the Commission for interstate transportation were unreasonable. It was further found that the interstate rates between Sioux City and points in the state of South Dakota were higher than the intrastate rates between Sioux Falls, Mitchell, Watertown, Aberdeen and Yankton, South Dakota, and points in the same state applicable to shipments by express which are transported under substantially

similar circumstances and conditions. These findings brought the case within the purview of the third section of the Act to Regulate Commerce.

The findings of the Interstate Commerce Commission were complete to establish the existence of conditions discriminatory against Sioux City and in favor of the five South Dakota jobbing points, with respect to the competition in the mutual trade territory in southern South Dakota.

Such being the conditions, the Interstate Commerce Commission held "that the defendants should cease and desist from continuing said undue preference and undue discrimination." The order was made in strict accordance with the letter of section 3 of the Act to Regulate Commerce, and in accordance with the form heretofore passed upon by this court as valid and sufficient.

The error into which the Supreme Court of South Dakota has evidently fallen, is in assuming that it is the duty of the Interstate Commerce Commission to formulate a specific schedule of rates and order such schedule to be put into effect by the express companies. Such is, however, not the intent of the law. It is the province of the Interstate Commerce Commission to determine whether a given rate, which may be complained of, is unreasonable and discriminatory. When the Commission finds the rate to be unreasonable and discriminatory it orders the carrier to remove the discrimination, and it is then the duty of the carrier to take such action as may be necessary to comply with the order of the Interstate Commerce Commission. The fact that in this case the Interstate Commerce Commission, after finding that the Sioux City-South Dakota rates were discriminatory as compared to the South Dakota intrastate rates, did not formulate a schedule of rates and order the plaintiffs in error to put such rates into effect does not in any manner militate against the validity of the of the order made by the Commission. There was no legal requirement that the Commission should make an order "approving or adopting the schedule of rates filed by defendants "with the Board", or an order "making such schedule its "schedule." The Commission made a finding that discrimination existed and made an order directing the plaintiffs in error to remove such discrimination, and that is all that the Commission, under the provisions of the Act to Regulate Commerce, was obliged to do.

Plaintiffs in error attempted to comply with the order of the Interstate Commerce Commission by putting into effect the ICC rates between Sioux Falls, Aberdeen, Watertown, Mitchell and

Yankton and other South Dakota points, leaving as to all other South Dakota intrastate traffic, the South Dakota Distance Tariff No. 2 in full force and effect. (Transcript pp. 27-28.)

This action upon the part of the express companies was, we submit, in strict accordance with the provisions of the order made by the Interstate Commerce Commission and to restrain the plaintiffs in error from putting into effect such tariffs was a direct attempt upon the part of the South Dakota Supreme Court to "enjoin, set aside, annul or suspend, in whole or in part" an order of the Interstate Commerce Commission. To do this the South Dakota Supreme Court possessed no jurisdiction under the acts of Congress.

While, as observed by Mr. Justice HUGHES in the Shreveport case, rates can be adjusted and equalized either by raising the lower or by lowering the higher rate, and while in the case at bar the discrimination against Sioux City could doubtless be removed by lowering the interstate rate from Sioux City to South Dakota points, the fact remains that under the decision of the Interstate Commerce Commission the express companies were not obliged to resort to the alternative of lowering the higher rates in order to remove the discrimination.

The Interstate Commerce Commission established the interstate rate between Sioux City and South Dakota points. It is a part of the uniform system of interstate rates adopted by the Commission and applied to interstate traffic throughout the entire country. The Interstate Commerce Commission, in establishing it, declared it to be a reasonable rate for interstate traffic, and in the case at bar expressly finds that "there is no proof that the rates which this Commission has approved are unreasonable, nor has a basis been laid for a modification of our order." And the Commission also found "that the rates for the interstate transportation of shipments by express between Sioux City, Iowa, and points in the state of South Dakota, heretofore prescribed by us as reasonable, have not been shown to be unreasonable."

The holding of the Interstate Commerce Commission was that the express companies possess the right to charge the rates prescribed by the Commission for interstate traffic between Sioux City, Iowa, and South Dakota points. If the express companies have the right to charge the interstate rates, how can they be compelled to reduce those rates in order to remove the discriminations which Commission orders them to remove? The express companies can only be required to remove the discrimination by raising the lower intrastate rates to the level of the higher inter-

state rates, and that is the only way in which the order of the Interstate Commerce Commission can be carried into effect without depriving the express companies of their property without due process of law. To hold otherwise would be to hold, that although the express companies possess the right to charge the interstate rates between Sioux City and South Dakota points, they must waive their legal rights in this respect, in order to remove the discrimination against Sioux City, and charge less for transportation between Sioux City and South Dakota points than the law gives them the right to charge.

Reading the order of the Interstate Commerce Commission in connection with its opinion in this case, we submit that there is no ambiguity whatever in it, and that it authorizes the express companies to raise the South Dakota intrastate rates to and from Aberdeen, Mitchell, Sioux Falls, Watertown and Yankton to the level of the ICC rates between Sioux City and South Dakota points. No other construction can be given to the order, in view of the finding of the Interstate Commerce Commission that the ICC rates are reasonable, and that consequently the express companies are entitled to charge them.

We submit, therefore, that the South Dakota Supreme Court erred, both as to the facts and as to the law applicable to the facts, when it held (Transcript p. 109):

"This is not an action to 'suspend or set aside' the order of "the Commission but one to enjoin the putting into effect of a "schedule of rates, neither prepared nor approved by the Com-"mission and clearly not authorized by it, which schedule de-"fendants are seeking to put into force in direct violation of the "laws of this state."

THIRD POINT.

The Supreme Court of South Dakota further held that it was authorized to grant a permanent injunction in this suit for the reason that the plaintiffs in error have not filed the proposed tariffs with the Board of Railroad Commissioners of the state of South Dakota, pursuant to the provisions of a local South Dakota statute. Upon this point the court, in its opinion, says (Transcript 1, 118):

"Another question is presented by the record herein, which, "though subordinate to the ones already discussed, is import-"ant as affecting the outcome of the present action. By § 10, "ch. 207, Laws 1911, as amended by ch. 304, Laws 1913, no ad-"vance in intrastate rates may be made except after thirty days'

"notice to the Board by filing of schedules, and to the public by "publication and posting in every office of the carrier in the "state. Said act also provides that no change in rates shall go "into effect until allowed by the Board. It is clear that, if the "Commission has the authority claimed for it by defendants, the "latter requirement could be disregarded, but it would seem that "the requirement of notice to the Board and publication would "be such a reasonable regulation as should be sustained. The "order in question was made on May 23, 1916, it was by its terms "to become effective August 15, 1916; ample time was thus given "to the defendants to file their schedules and make the publica- "tions required by such statute. Such requirements as to filing "and notice are not in conflict with, nor derogatory to, the au- "thority of the Commission. It is reasonable and just that de- "fendant's patrons in South Dakota and the Board should be "given thirty days' notice of an intention on the part of carriers "to put into effect rates which so vitally affect transportation "and especially transportation that is purely intrastate."

Chapter 207 of the Laws of South Dakota, 1911, is an Act "Regulating Common Carriers and Defending the Powers and Duties of the Board of Railroad Commissioners of the state of South Dakota." Section 10 of this act, as amended by Chapter 304 of the Laws of 1913, governs the making and filing of schedules of rates, fares and charges for the transportation of passengers, property and express by common carriers in the state of South Dakota. A copy of this section is appended as Appendix "A" to this brief.

The record in this case discloses the following state of facts: The order of the Interstate Commerce Commission, made upon the complaint of the Traffic Bureau of the Sioux City Commercial Club, required the plaintiffs in error, the American Express Company and Wells Fargo & Company, to remove the discrimination in its rates against Sioux City on or before August 15, 1916. (Transcript pp. 54-55.) Subsequently the time within which the order was to become effective was extended until September 15, 1916. (Transcript p. 26.)

On July 27, 1916, a conference was held at the office of the South Dakota Board of Railroad Commissioners with respect to intrastate express rates in that state. At this conference there were present the Board of Railroad Commissioners, representatives of the plaintiffs in error and of the other express companies of the state, and representatives of the commercial organizations, wholesalers and jobbers of Sioux Falls, Mitchell, Aber-

deen, Watertown and Yankton. (Transcript p. 4.) At this conference the representatives of the express companies applied to the Board of Railroad Commissioners for permission to put into effect and apply on the transportation of property by express between stations within the state of South Dakota the ICC classifications and rates. (Transcript p. 4.) The Board denied this request and upon August 5, 1916, the following order was made (Transcript p. 62):

"And it is Further Ordered, That the application of the Adams "Express Company, American Express Company, Great North-"ern Express Company and Wells Fargo & Company, to put into "effect on intrastate traffic in this state from the stations of "Aberdeen, Watertown, Sioux Falls, Mitchell and Yankton, to "points in the state of South Dakota, as well as their application "to put into effect on intrastate traffic in this state, the system "of zone or block rates approved by the Interstate Commerce "Commission, until the further order of this Board in the prem-"ises, be and same hereby is denied.

"By order of the Board."

Plaintiffs in error, the American Express Company and Wells Fargo & Company, then prepared express rate tables applying to the carriage of express freight between Sioux Falls, Aberdeen, Mitchell, Watertown, Yankton and other South Dakota points, the ICC rates, but leaving the rates prescribed by South Dakota Distance Tariff No. 2 in effect as to all other intrastate business in South Dakota. These tables of rates were published and filed with the Interstate Commerce Commission on or about August 15, 1916, and upon August 25th, 1916, they were tendered by plaintiffs in error to the Board of Railroad Commissioners of the state of South Dakota for filing. (Transcript pp. 27-28.) The Board refused to file the tables of rates and passed a formal resolution refusing to approve the rates, and directing the tables of rates tendered for filing to be returned to the plaintiffs in error. (Transcript pp. 18-20, 28.)

The resolution adopted by the South Dakota Board of Railroad Commissioners refusing to file the tables of rates presented by plaintiffs in error contained the following recitals (Transcript pp. 18, 19.):

"Whereas, the American Express Company and the Wells "Fargo & Company Express by F. G. Airy, their agent, have on "this 25th day of August, 1916, presented to the Board of Rail-"road Commissioners of the State of South Dakota, for the ap-"proval of and to be filed in the office of said board, certain

"classifications, tariffs, tables and schedules, proposing advances "in local and joint intrastate rates, fares and charges for the "transportation of property by express between Aberdeen, Mitch- "ell, Sioux Falls, Watertown or Yankton, South Dakota, and all "stations of the American Express Company or the Wells-Fargo "& Company Express, within the State of South Dakota, which "classifications, tariffs, tables and schedules are designated and "and described as follows, to-wit: * * * * * * *

"And Whereas, the said Express Companies or any of them "or their agent, F. G. Airy, or any person acting for them or on "their behalf or on behalf of either of them have not applied to "the Board of Railroad Commissioners of the State of South Da- "kota, for their assent to the filing of or for their approval of "said classifications, tariffs, tables, schedules or any of them "and the said Board of Railroad Commissioners has not and "does not assent to the filing thereof, and has not and does not "approve or allow the said classifications, tariffs, tables or sched- "ules proposing advances in intrastate rates, fares and charges "or any of them; and,

"Whereas, the said classifications, tariffs, tables and sched- "ules have not been printed and published, and thirty days "notice of the time when the said proposed classification, tariffs, "tables and schedules shall go into effect has not been given to "the Board of Railroad Commissioners of the State of South Da- "kota, and to the public, as required by the provisions of Sec- "tion 10, of Chapter 207 of the Laws of 1911.

"Therefore, Be it Resolved by the Board of Railroad Commis- "sioners of the State of South Dakota, that the classifications, "tariffs, tables and schedules proposing advances in local and "joint intrastate express rates between certain points within the "state of South Dakota hereinafter fully described and set forth "be and they are hereby disapproved, disallowed and rejected, "and that the Secretary of this Board be and he is hereby directed "to return all of the said classifications, tariffs, tables and sched- "ules proposing advances in intrastate express rates as aforesaid "to F. G. Airy, the agent of the express companies proposing the "the same together with a certified copy of this resolution."

It thus appears from the record in this case, that plaintiffs in error, on the 27th day of July, 1916, and more than thirty days before the 15th of September, 1916, the date upon which the tariffs were to become effective in order to comply with the order of the Interstate Commerce Commission, made a formal request of the Board of Railroad Commissioners of the state of South

Dakota for permission to put into effect the ICC rates between Sioux Falls, Aberdeen, Watertown, Mitchell and Yankton and other South Dakota points and that the Board refused such permission. It further appears that on August 25th the tables of rates were tendered to the Board and that the Board refused to file them, and returned them to plaintiff in error upon the ground that the "Board of Railroad Commissioners has not and does not "assent to the filing thereof and has not and does not approve or "allow the said classifications, tariffs, tables or schedules pro- "posing advances in intrastate rates, fares and charges, or any "of them."

We submit that plaintiffs in error have done all that could legally be required of them under the South Dakota state statute (Appendix A hereto), and that it was not incumbent upon plaintiffs in error to comply with the provisions of a state statute after the South Dakota Board of Railroad Commissioners had expressly denied permission to them to make such compliance.

Should it be held, that in addition to complying with the order of the Interstate Commerce Commission, it was also incumbent upon plaintiffs in error to conform also to the provisions of the South Dakota statute regarding the approval of rate tables by the Board of Railroad Commissioners, and that plaintiffs in error could not put into effect the rates ordered by the Interstate Commerce Commission until after such rates had been approved by the South Dakota Board of Railroad Commissioners, then the orders of the Interstate Commerce Commission would be subject to the approval of the local state boards throughout the country, and any such board could, by withholding its approval, veto any order which the Interstate Commerce Commission might make.

Such a proposition would be an absurdity, as it would render the supreme federal authority subject to the control of the local authorities in each of the forty-eight states.

We submit that it was not incumbent upon plaintiffs in error to comply with the South Dakota statute (Appendix "A" hereto) before putting in force the rates necessary to comply with the order of the Interstate Commerce Commission. It is elementary that in all matters of which Congress has been given control under the constitution, its authority is supreme, and that its authority cannot be regulated, hampered or impeded by any state statute, regulation or board. The Interstate Commerce Commission, acting within its legal authority, ordered plaintiffs in error to remove the discriminations existing in the Sioux City-South

Dakota rates, and plaintiffs in error were thereby empowered to take the action necessary to carry into effect the order of the Commission, without let or hindrance from the Board of Railroad Commissioners of the state of South Dakota.

In conclusion upon this point, we submit, that compliance with the South Dakota statute in regard to the filing of tariffs and rates was wholly unnecessary, but that if it was necessary, plaintiffs in error have so far as it was possible for them to do, fully complied with the South Dakota statute and cannot be held responsible for the refusal upon the part of the Board of Railroad Commissioners of that state to approve the rates sought to be put into effect to comply with the order of the Interstate Commerce Commission, or to permit the schedules of rates to be filed.

FOURTH POINT.

We now come to the main proposition in this case, the question as to the extent of the power of the Interstate Commerce Commission to regulate rates for intrastate traffic. The South Dakota Supreme Court, in discussing the order entered by the Interstate Commerce Commission upon the complaint of the Traffic Bureau of the Sioux City Commercial Club, held:

"If the purported order of the Commission does, in any re-
"spect, regulate intrastate commerce, it is to that extent void ow-
"ing to the Commission's want of jurisdiction over the subject
"matter."

There can be no question but that the traffic by express, between Sioux Falls, Aberdeen, Watertown, Mitchell and Yankton, in the State of South Dakota and other points in that State, is intrastate traffic. It is conceded that the order in controversy made by the Interstate Commerce Commission applied to such traffic. The position taken by the South Dakota Supreme Court is that the order is void because it attempts to regulate intrastate traffic, a subject which is without the jurisdiction of the Interstate Commerce Commission. The South Dakota Supreme Court consequently held, that as the order was without the jurisdiction of the Commission, it was void, and consequently the South Dakota State courts possessed jurisdiction to enjoin its enforcement.

It appears from the record in this case that Sioux City, situated in the State of Iowa, just across the South Dakota boundary line, is a trade competitor with Sioux Falls, Aberdeen, Watertown, Mitchell and Yankton in the trade territory of southeastern South Dakota. Between Sioux City and points in South

Dakota the ICC rates apply. Between the five South Dakota cities and other South Dakota points the South Dakota Express Distance Tariff No. 2 is in effect. The ICC rates upon the 100 pound package basis are considerably in excess of the local South Dakota state rates. The result is that the wholesalers and jobbers of Sioux City are placed at a very considerable disadvantage as compared to the jobbers and wholesalers of the South Dakota jobbing centers, by reason of the fact that Sioux City is situated on the south rather than upon the north bank of the Big Sioux river. The Interstate Commerce Commission found that these conditions gave an undue preference to Sioux Falls, Aberdeen, Mitchell, Watertown and Yankton, and an undue and unreasonable prejudice and disadvantage was effected against Sioux City. (Transcript p. 45).

The Interstate Commerce Commission did not go so far as to hold that the South Dakota schedule, as a whole, was unduly low, and refused to extend its investigation so as to review the relation of express rates for other movements than those between Sioux City and South Dakota points on the one hand, and between points in that State on the other. The findings of the Commission were expressly limited to the allegations of unreasonableness and unjust discrimination found in the complaint of the Traffic Bureau of the Sioux City Commercial Club, and the order applied solely to the rates between the trade competitors of Sioux City and other points in the State of South Dakota. As to those points, namely, Sioux Falls, Aberdeen, Watertown, Mitchell and Yankton, the five trade competitors of Sioux City in the trade territory of southeastern South Dakota, the Interstate Commerce Commission found the rates prescribed by the South Dakota Express Distance Tariff No. 2 to constitute a burden upon interstate commerce. This burden the Commission ordered removed.

It is true that the first section of the Act to Regulate Commerce provides that the Act shall not apply to the transportation of property "wholly within one State," but this provision is, under the decisions of this court, subject to the exception that the intrastate rates shall not be so manipulated as to constitute a burden upon intersate commerce.

We do not deem it necessary to argue at length in this case the proposition that Congress, under the commerce clause of the Constitution, possesses the power to abrogate any intrastate rate which becomes a burden upon interstate commerce. That proposition was definitely settled by this court in The Minnesota Rate

Cases (230 U. S. 352), and in the Shreveport case, (234 U. S. 342). Under the decision in The Minnesota Rate Cases it was established that Congress, whenever it determines to act, possesses the undoubted power to set aside any intrastate rate which burdens interstate commerce, and under the decision in the Shreveport case it was adjudicated that the Interstate Commerce Commission is an instrumentality of Congress, whose action constitutes the action of Congress itself. The question, therefore, of the authority of the Interstate Commerce Commission to make orders to prevent intrastate rates from burdening interstate commerce is no longer open to argument.

The conflict between local and national interests in the matter of commercial intercourse throughout the United States is as old as the constitution itself. The commerce clause was not inserted in the constitution without due, careful and prolonged deliberation. It was obviously necessary to remove the friction caused by the local regulations of commerce adopted by the various colonies during the existence of the Confederation. It was clearly evident to the members of the constitutional convention that the consolidation of the thirteen colonies into a single nation depended, more than upon any other factor, upon the commerce between the states being made free and unrestrained, and unhampered by any local regulations. Although the advantage which has ensued by the giving to Congress the exclusive control over commerce among the states has always been evident to everyone, there has, from the very beginning, been displayed the utmost reluctance upon the part of each locality to part with the supposed advantages obtained through local commercial regulations. From the time that Rhode Island refused, in the first instance, to ratify the constitution, each state has been tenacious upon the subject of maintaining its local regulations, while favoring national control throughout the remainder of the country. There is no state in the Union in which the railroads and other transportation companies have been more severely criticised for the making of discriminations than in South Dakota, and for many years discriminations in transportation matters in favor of individual shippers, or preferred communities have received the most drastic condemnation. When, however, it comes to asking the people of South Dakota to relinquish the advantage in express rates which they possess by reason of the fact that the South Dakota intrastate rates are lower than the ICC rates, there is shown the greatest disinclination to surrender the preferences which they have been receiving over the citizens of their

sister states.

In its decision in this case, the Supreme Court of South Dakota admits, that under the decisions of this court in The Minnesota Rate Cases and in the Shreveport case, the Interstate Commerce Commission possesses the power to make the order in controversy, even though that order affects intrastate rates. The South Dakota Court, however, refused to follow the plain decisions, of this court, and in its opinion makes the following remarkable declaration:

"We feel confident that, upon further consideration of these "most important questions, the Supreme Court will recede, if "not from the position it took in the Minnesota case in regard "to the extent of the federal authority over interstate commerce, "at least from the position it took in the Shreveport case in re"gard to the proper construction to be given to the Act to Regu"late Commerce. Moved by such confidence, we deem it our duty "to hold the order of the Commission, if subject to the construc"tion given it by defendant, to be absolutely void owing to lack "of authority in the Commission to make any such an order. If, "however, this case shall reach the Supreme Court and it shall "adhere to its decisions in the Minnesota and Shreveport cases, "we shall cheerfully bow to its supreme authority and abide "thereby".

We respectfully submit that this court, contrary to the "confident" expectations of the South Dakota Supreme Court, will in this case "adhere to its decisions in the Minnesota and Shreveport cases".

FIFTH POINT.

In conclusion, we submit that the judgment of the South Dakota Supreme Court in this case should be reversed for the following reasons:

First: The order of the Interstate Commerce Commission, made upon the complaint of the Traffic Bureau of the Sioux City Commercial Club, requiring plaintiffs in error to remove the discriminations found to exist in the Sioux City-South Dakota rates, was a valid order, made within the legal authority vested by Congress in the Commission, even though compliance with that order may have required, or authorized plaintiffs in error to raise the intrastate rates prescribed by authority of the state of South Dakota for transportation of express freight between Sioux Falls, Aberdeen, Mitchell, Watertown and Yankton and other South Dakota points.

Second: Compliance with the provisions of the South Dakota statute, respecting the approval of rates by the Board of Railroad Commissioners of that state and respecting the obtaining of the permission of the Board of Railroad Commissioners to file tables or schedules of rates, was unnecessary, for the reason that local state statutes cannot be permitted to interfere with the due exercise of its authority by the Interstate Commerce Commission, and for the further reason that compliance with the South Dakota statute was rendered impossible by reason of the refusal of the South Dakota Board of Railroad Commissioners to consent to the making of rates or filing of schedules of rates required to put into effect the order of the Interstate Commerce Commission.

Third: The Supreme Court of the state of South Dakota possessed no jurisdiction over the subject matter of this action, and no jurisdiction of any case brought to "enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission."

Respectfully submitted,

T. B. HARRISON,

BRANCH P. KERFOOT,

C. O. BAILEY and

J. H. VOORHEES,

For Plaintiffs in Error.

C. W. STOCKTON,

Of Counsel.

APPENDIX A.

(SECTION 10 OF CHAPTER 207 OF THE SESSION LAWS OF SOUTH DAKOTA, 1911, AS AMENDED BY CHAPTER 304, LAW OF SOUTH DAKOTA, 1913.)

Section 10. Every common carrier subject to the provisions of this article shall print and keep for public inspection schedules showing the rates, fares and charges for the transportation of passengers, property, express, and messages by telephone, which any such common carrier has established, and which are in force at the time upon its lines. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property, passengers, express, and messages by telephone, will be carried, and shall contain the classification of freight and express in force upon such common carrier, and shall also state separately all terminal charges, storage charges, icing charges, all privileges or facilities granted or allowed, and any rules or regulations which in any wise change, affect or determine any part of the aggregate of such aforesaid rates, fares and charges; such schedule shall be plainly printed in large type of at least the size of ordinary pica, and a copy for the use of the public shall be kept in every freight office, messenger station, express office and telephone office of such common carrier where it can be conveniently inspected, and such common carrier shall keep a printed notice posted in every such freight office, passenger station, express office and telephone office indicating where therein such schedule can be found. No advance shall be made in the rates, fares and charges or in joint rates, fares and charges, which have been established and published as aforesaid by any common carrier, or established or ordered into effect at the time this Act shall take effect by the board of railroad commissioners in compliance with the requirements of this section, except after thirty days' notice to the board and to the public published as aforesaid, which shall plainly state the changes proposed to be made in the schedules then in force, and the time when the increased rates, fares or charges are desired, and the proposed changes shall be shown by printing new schedules or shall be plainly indicated upon the schedules in force at the time and kept for public inspection. No such change in rates, rules, regulations or practices shall go into effect until allowed by the board of railroad commissioners. Reduction in such published rates, fares or charges may be made without previous public notice, but whenever any such reduction is made, immediate notice of the same shall be given to the board and the

public, posted and published as aforesaid, and the changes made shall immediately be made public by printing new schedules, or shall immediately be plainly indicated upon the schedules at the time in force and kept for public inspection. And when any such common carrier shall have established and published its rates, fares and charges in compliance with the provisions of this section, it shall be unlawful for such common carrier to charge, demand, collect or receive from any person or persons a greater or less compensation for the transportation of passengers, property, express and messages by telephone, or for any services in connection therewith than is specified in such published schedules of rates, fares and charges as may at the time be in force. Every common carrier subject to the provisions of this article shall file with the board of railroad commissioners of this state copies of all its schedules and rates, fares and charges which have been established and published in compliance with the requirements of this section, and shall promptly notify said board of all changes made in the same. Every common carrier shall also file with said board copies of all contracts, agreements or arrangements with other common carriers in relation to any traffic affected by the provisions of this article to which it may be a party. And in case where passengers, freight, express, and messages by telephone pass over continuous lines or routes in this state operated by more than one common carrier, and the several common carriers operating such lines or routes have established joint tariffs or rates or fares or charges for such continuous lines or routes, copies of such joint tariffs shall also in like manner be filed with said board. Such joint rates, fares and charges on all such continuous lines so filed as aforesaid shall be made public by such common carriers filing in the office of the board of railroad commissioners of the State of South Dakota, correct examined copies of all contracts or agreements existing or hereafter made effecting any state, interstate or proportional charge or rate, any part of which affects or goes to make up a rate charged in this state; but no common carrier, party to such joint tariff, shall be liable for the failure of any other common carrier party thereto, to observe and adhere to the rates, fares and charges thus made and published. If any such common carrier shall neglect or refuse to file or publish its schedules or tariffs of rates, fares and charges, and contracts and agreements relating thereto, as provided in this section, or any part of the same, such common carrier shall, in addition to other penalties herein prescribed, be subject to a writ of man-

damus to be issued by any circuit court of the state in the judicial circuit wherein the principal offices of such common carrier is situated, where such offense may be committed. And if such common carrier be a foreign corporation, then such writ may be issued by any circuit court in the judicial circuit where such common carrier accepts traffic and has an agent to perform such service, to compel compliance with the aforesaid provisions of this section, and such writ shall issue in the name of the State of South Dakota at the relation or upon the petition of the said board of railroad commissioners of this state, and failure to comply with its requirements shall be punishable as and for a contempt, and shall make such common carrier or corporation liable to a penalty of five hundred dollars for each day's failure to comply, and when any such writ of mandamus shall be so applied for by said commissioners, no bond shall be required of them by any court or judge in which or before whom any such application may be made.

APPENDIX B.

*Sioux City order
†Shreveport order

*It is ordered, That the above named defendants,
†It is further ordered, That defendant

according as they participated in the transportation, be, and
the Texas & Pacific Railway Company be, and

they are hereby, notified and required to cease and desist, on
it is hereby, notified and required to cease and desist, on

or before August 15, 1916, and [for a period of not
or before the 1st day of May, 1912, and for a period of not

less than two years††] thereafter to abstain, from publishing,
less than two years thereafter abstain, from exacting

demanding, or collecting higher rates for the transportation
any higher rates for the transportation

of shipments by express between Sioux City, Iowa, and
of any article from Shreveport, Louisiana, to

points in the state of South Dakota,
Dallas, Texas, and points on its lines intermediate thereto,

than are contemporaneously published, demanded or collected
than are contemporaneously exacted

for transportation under substantially similar circumstances
for the transportation of such article from Dallas, Texas, toward

and conditions for substantially equal distances between Sioux
said Shreveport for an equal distance,

Falls, Mitchell, Aberdeen, Watertown, and Yankton, S. Dak.,

on the one hand, and said points in the state of South Dakota,

on the other

†From following paragraph of order.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1916.

No. 902

AMERICAN EXPRESS COMPANY AND GEORGE C. TAYLOR, INDIVIDUALLY AND AS PRESIDENT OF THE AMERICAN EXPRESS COMPANY, and WELLS FARGO & COMPANY,

Plaintiffs in Error,

vs.

STATE OF SOUTH DAKOTA *ex rel.* CLARENCE C. CALDWELL, AS ATTORNEY GENERAL OF THE STATE OF SOUTH DAKOTA, and JOHN J. MURPHY, P. W. DOUGHERTY AND WILLIAM G. SMITH, AS AND CONSTITUTING THE BOARD OF RAILROAD COMMISSIONERS OF THE STATE OF SOUTH DAKOTA.

Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA.

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE.

JOHN BARTON PAYNE,
R. B. SCOTT,
A. P. HUMBURG,
As Amici Curiae, on behalf of Illinois Central R. R. Co., et al.

Washington D. C., MARCH 26, 1917.

BURTHORP-WARREN PRINTING COMPANY, CHICAGO.

IN THE

SUPREME COURT OF THE UNITED STATES,

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To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Come now John Barton Payne, R. B. Scott and A. P. Humburg, members of the bar of this court, and move the court for leave to file the accompanying brief in the above entitled cause as *amici curiae*.

In support of said motion, applicants represent to the court as follows:

1. In the above entitled case, the Supreme Court of South Dakota entered a decree, enjoining the plaintiffs in error from charging between points in South Dakota certain express rates authorized by an order of the Interstate Commerce Commission to remove unjust discrimination against interstate commerce and undue preference in favor of intrastate commerce.

2. Your applicants are solicitors for the appellants in the case of *Illinois Central Railroad Company, appellant,* v. *State Public Utilities Commission of Illinois et al., appellees,* No. 955, being 29 consolidated cases, now pending in this court. In said case the United States District Court for the Northern District of Illinois, Eastern Division, dismissed the appellants' bills of complaint seeking an injunction against the authorities of the State of Illinois from prosecuting the appellants for charging between points in Illinois certain passenger fares authorized by an order of the Interstate Commerce Commission to remove unjust discrimination against interstate commerce and undue preference in favor of intrastate commerce.

3. In each of said cases, No. 902 and No. 955, the power of the Interstate Commerce Commission to find and order the removal of unjust discrimination against interstate commerce and undue preference in favor of intrastate commerce caused by the existence of intrastate rates or fares established by state authority which are lower than interstate rates or fares found reasonable by said Commission, is denied.

4. In each of said cases, the decision of this court in *Houston & Tex. Ry.* v. *United States,* 234 U. S., 342, com-

monly known as the Shreveport case, is attacked as unsound.

5. In each of said cases is involved the right of common carriers subject to the Act to Regulate Commerce, to establish and put in force rates or fares within a state authorized by the Interstate Commerce Commission in order to remove unjust discrimination against interstate commerce and undue preference in favor of intrastate commerce, when the said rates or fares are higher than rates or fares established by state authority.

6. Some of the issues involved in said causes are similar, and the decision in one may affect the decision in the other.

7. Counsel for both plaintiffs in error and defendants in error in No. 902 have given their consent to the filing of a brief in this case by applicants as *amici curiae*.

Wherefore, applicants move that leave be given them to file the accompanying brief as *amici curiae*.

JOHN BARTON PAYNE,
R. B. SCOTT, and
A. P. HUMBURG.
As Amici Curiae, on behalf of Illinois Central Railroad Co. et al.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1916.

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Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA.

BRIEF IN SUPPORT OF THE PLAINTIFFS IN ERROR.

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As Amici Curiae, on behalf of Illinois Central R. R. Co., et al.

Washington D. C., MARCH 26, 1917.

INDEX.

CASES CITED.

IN THE

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Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA.

BRIEF IN SUPPORT OF THE PLAINTIFFS IN ERROR.

PART I. STATEMENT.

This case comes here on a writ of error to reverse a judgment of the Supreme Court of South Dakota, entered in an original proceeding in that court, by which judgment a permanent injunction was granted against the putting into effect of certain intrastate rates on express between points in the State of South Dakota.

NOTE. All italics throughout this brief are ours.

In 1911 the Board of Railroad Commissioners of the State of South Dakota promulgated a certain schedule of maximum charges for the transportation of express between points in said state. In 1912 the Interstate Commerce Commission entered upon an investigation of express rates, practices, accounts, and revenues, and in 1914, as a result of that investigation, the Commission promulgated a zone and block system of rates whereby the rates for interstate transportation of property by express throughout the United States were placed upon a uniform basis, and the interstate rates between Sioux City, Iowa, and points in South Dakota, and between other points became effective on February 1, 1914. (24 I. C. C. Rep., 380, 28 I. C. C. Rep., 131, 35 I. C. C. Rep., 3.)

Thereafter merchants and others located at Sioux City, Iowa, filed a complaint with the Interstate Commerce Commission against the plaintiffs in error, alleging in substance that said interstate rates between Sioux City, Iowa, and points in South Dakota were unreasonably prejudicial, and disadvantageous to Sioux City as compared with the express rates applied between Sioux Falls, Aberdeen, Watertown, Mitchell, and Yankton, S. D., and points in South Dakota. The prayer was that the plaintiffs in error be required to publish and maintain rates between Sioux City and points in South Dakota which should be no higher than those contemporaneously maintained for substantially the same distances between South Dakota cities competing with Sioux City in the South Dakota territory, and other points in the state. The Commercial Clubs of Sioux Falls, Aberdeen, and Mitchell intervened in said case before the Interstate Commerce Commission. (Rec., 25.)

The Commission found that the interstate rates by it theretofore prescribed as reasonable for the transporta-

tion of shipments by express between Sioux City, Iowa, and points in South Dakota had not been shown to be unreasonable; that by maintaining higher interstate rates between Sioux City and points in South Dakota than between Sioux Falls, Mitchell, Aberdeen, Watertown, and Yankton, S. D., and points in the same state, applicable to shipments by express which are transported under substantially similar circumstances and conditions, the defendants (plaintiffs in error here) were giving an undue preference to Sioux Falls, Mitchell, Aberdeen, Watertown, and Yankton; that thereby an undue and unreasonable prejudice and disadvantage was effected against Sioux City, Iowa; and that the defendants should cease and desist from continuing said undue preference and unjust discrimination.

The Commission also made an order that the defendants "according as they participate in the transportation be, and they are hereby notified and required to cease and desist on or before August 15, 1916 (extended to September 15, 1916), and thereafter to abstain from publishing, demanding, or collecting, higher rates for the transportation of shipments by express between Sioux City, Iowa, and points in the State of South Dakota than are contemporaneously published, demanded, or collected for transportation under substantially similar circumstances and conditions for substantially equal distances between Sioux Falls, Mitchell, Aberdeen, Watertown, and Yankton, S. D., on the one hand and points in the State of South Dakota on the other, which said relation of rates has been found by the Commission to be unjustly discriminatory." (*Traffic Bureau of Sioux City Commercial Club* v. *American Express Co. et al.*, 39 I. C. C. Rep., 703, Rec., 54-55.)

On August 28, 1916, the wholesale jobbers and manufacturers doing business at Sioux Falls, Mitchell,

Watertown, Aberdeen, and Yankton, filed their petition in the District Court of the United States for the Western Division of the Northern District of Iowa against the United States and the Interstate Commerce Commission, the Express Companies, and the Sioux City Commercial Club, to suspend, set aside, and enjoin said order of the Interstate Commerce Commission, and the plaintiffs' motion for interlocutory injunction was denied. (*Brown Drug Company* v. *U. S.*, 235 Fed. Rep., 603, Rec., 28, 73, 83-84.)

On December 4, 1916, in the proceeding first above mentioned, the Supreme Court of South Dakota entered its final judgment granting a permanent injunction against the putting into effect of the rates approved by said order of the Interstate Commerce Commission as applied to transportation between points in South Dakota (Rec., 89-90); and the court's opinion appears at p. 106 of the record.

The undersigned, *amici curiae*, respectfully submit that the following, among other things contained in said opinion, are based upon erroneous conceptions of the law:

> 1. "If the purported order of the Commission does, in any respect, regulate intrastate commerce, it is to that extent void owing to the Commission's want of jurisdiction over the subject matter." (Rec., 109.)
>
> 2. "Behind unjust discrimination there always exists unreasonable—that is, unjust and unfair—rates; therefore the sole remedy for unjust discrimination lies in the establishment of reasonable rates. Unreasonable rates being the cause and unjust discrimination the effect, the authority to remove unjust discrimination is to be measured by the authority to prescribe reasonable rates. Every appeal to a commission seeking the termination of discrimination is, in effect, a prayer for the establishment of reasonable rates. Such an appeal can-

not be effective unless made to those having authority to prescribe rates." (Rec., 110.)

3. "While we are of the opinion that the language of the Act to Regulate Commerce is so clear as to admit of little doubt of the legislative intent and that, therefore, the question of expediency is entitled to little or no consideration; yet, in view of the fact that the Supreme Court in the Shreveport case advances the thought that 'Congress alone is competent to deal' with 'the relation of intrastate and interstate rates,' we feel justified in suggesting that there is another power that can be relied upon to prevent injustice. The federal courts, through their power to set aside rates unjust to the interstate carrier, have full control over the only thing that will ever result in unjust discrimination as between interstate and intrastate traffic—the fixing by the Commission or the Board of a rate that is unjust to the carrier. As before stated, unreasonable rates are the sole cause of unjust discrimination. * * * Moreover, the record herein shows that defendants had sought to have the federal courts restrain the enforcement of such rates upon the ground that they were confiscatory and such relief had been refused. The intrastate rates being conceded to be reasonable as intrastate rates, there can be no unjust discrimination traceable thereto." (Rec., 115.)

4. "If, under its power to regulate interstate commerce, Congress can and does even indirectly fix the rates to be charged for intrastate commerce, even though such control professes to be limited in its territorial application, it must from the very necessities of commercial intercourse and competition result in a conformity of all intrastate rates to those thus prescribed. In other words, there is no such thing as a limited regulation by Congress of the charges for intrastate commerce—wherever Congress steps in, the free action of the local authorities is throttled, as they must of necessity eliminate discrimination and can only do so by conforming all rates to those prescribed by the dominant power." (Rec., 110.) * * *

"We do not believe sound logic will permit of the conclusion that, while Congress did not authorize

the Commission to directly prescribe intrastate rates and thus establish a unified control over both interstate and intrastate rates, that it did intend to give it the power, under the guise of preventing unjust discriminations, to exercise exactly the same control. When we contemplate the inevitable result of giving to the Commission a dominant power over intrastate rates in even a limited territory, we must recognize that through the exercise of such power it must exert an indirect influence absolutely controlling the intrastate rates throughout the state. Therefore, in view of all the above, we do not believe that Congress intended to exert any other than the power which at that time was conceded by all to have been given to it by the Constitution; and with all due respect to the Supreme Court, we are constrained to differ from it and hold that the proviso in Section 1 of said act has the effect, just as it purports, of limiting 'the provisions of this act,' so that no provision, whether it be one found in Section 3 or elsewhere, 'shall apply to the transportation of passengers or property * * * wholly within one state * * *' We think any other construction does violence to the plain wording of such proviso." (Rec., 111-112.)

5. "The Commission did not order that the discrimination be removed by an increase of intrastate rates. True it intimated in its report that such method of removing the discrimination would be justified by the facts. Why then did the Commission so word its order as to leave it optional with the defendants, and why did it omit to prescribe the territory to which its order should apply? May we not fairly presume that it was because the Commission realized that, in order to raise the intrastate rates, the defendants would be under the necessity of applying for authority to the Board or of establishing in court the unreasonableness of the intrastate rates, and that, if the Board or courts granted relief, it would be for them to prescribe the territory to which the new rates should apply? So construed the validity of the order is beyond question." (Rec., 118.)

PART II. JURISDICTION OF INTERSTATE COMMERCE COMMISSION TO REMOVE UNJUST DISCRIMINATION AGAINST INTERSTATE COMMERCE AND UNDUE PREFERENCE IN FAVOR OF INTRASTATE COMMERCE, RESULTING FROM THE OPERATION OF STATE RATES, IS NO LONGER AN OPEN QUESTION.

The Shreveport case is decisive of this South Dakota Express Rate case. The order of the Interstate Commerce Commission is not void.

The statement of facts contained at pp. 1 to 6 of the brief and argument for plaintiffs in error and the summary given above make it very plain that, in principle, this case is identical with the *Shreveport case,* as will more fully appear from the following resume:

In the so-called *Shreveport case,* entitled *Houston East & West Texas R. Co.* v. *U. S.*, 234 U. S., 342 (1914), opinion by Mr. Justice Hughes, suits were brought by the carriers in the Commerce Court to set aside an order of the Interstate Commerce Commission upon the ground that it exceeded the Commission's authority. The carriers had been ordered by the Commission to abstain from charging higher rates for the transportation of any article from Shreveport, La., to Houston, Tex., and points on their lines intermediate thereto than are contemporaneously exacted for the transportation of such articles from Houston, Tex., toward Shreveport for an equal distance, as said relation of rates had been found by the Commission in its said report to be reasonable. (pp. 347-8.) The Interstate Commission and the Railroad Commission of Louisiana intervened in opposition to the carriers. The Commerce Court dismissed the carriers' petition. (205 Fed. Rep., 380.)

The complaint filed with the Interstate Commerce Commission was that the carriers maintained unreasonable rates from Shreveport to various points in

Texas, and that in the adjustment of rates over their respective lines they *unjustly discriminated in favor of traffic within the State of Texas and against similar traffic between Louisiana and Texas.* (p. 345.)

The gravaman of the complaint, said the Interstate Commerce Commission, was that the carriers made rates out of Dallas and other Texas points into eastern Texas which were much lower than those which they extended into Texas from Shreveport. (p. 346.)

It appears that the Interstate Commerce Commission fixed rates as reasonable in measure substantially the same as those fixed by the Railroad Commission of Texas and charged by the carriers for transportation between points in Texas (p. 346) and the Interstate Commerce Commission also found (p. 347) that the carriers maintained "higher rates from Shreveport to points in Texas" than were in force from cities in Texas to such points under substantially similar conditions and circumstances, and that thereby "an unlawful and undue preference and advantage" was given to the Texas cities and a discrimination that was "undue and unlawful" was effected against Shreveport.

In order to *correct* this discrimination, the carriers were directed to desist from charging higher rates for the transportation of any commodity from Shreveport to Dallas and Houston, respectively, and intermediate points than were contemporaneously charged for the carriage of such commodity from Dallas to Houston toward Shreveport for equal distances, and the *Commission found that relation of rates to be reasonable.* (23 I. C. C. Rep., 31, 46-48.)

The Commission's opinion stated that under this order it will be the duty of the carriers "to duly and justly equalize the terms and conditions" upon which

they will extend transportation to traffic of a similar character moving into Texas from Shreveport with that moving wholly in Texas, but that in effecting such equalization the class scale of rates as prescribed shall not be exceeded. (p. 349.)

The carriers assailed the order in its entirety, but subsequently they withdrew their opposition to the fixing of maximum class rates and these rates were put in force by the carriers. The attack was continued as to commodity rates. The Supreme Court's opinion proceeds, p. 349:

> "There are, it appears, commodity rates fixed by the Railroad Commission of Texas for intrastate hauls which are substantially less than the class, or standard, rates prescribed by that Commission; and thus the commodity rates charged by the carriers from Dallas and Houston eastward to Texas points are less than the rates which they demand for the transportation of the same articles for like distances from Shreveport into Texas. The present controversy relates to these commodities.
>
> The point of the objection to the order is that, *as the discrimination found by the Commission to be unjust arises out of the relation of intrastate rates, maintained under state authority, to interstate rates that have been upheld as reasonable, its correction was beyond the Commission's power.* Manifestly, the order might be complied with, and the discrimination avoided, either by reducing the interstate rates from Shreveport to the level of the competing intrastate rates, or by raising these intrastate rates to the level of the interstate rates, or by such reduction in one case and increase in the other as would result in equality. But it is urged that, so far as the interstate rates were sustained by the Commission as reasonable, the Commission was without authority to compel their reduction in order to equalize them with the lower intrastate rates. The holding of the Commerce Court was" (*T. & P. Ry. Co.* v. *U. S.*, 205 Fed. Rep., 380) "that the order relieved the appellants *from further obligation to ob-*

serve the intrastate rates and that they were at liberty to comply with the Commission's requirements by increasing these rates sufficiently to remove the forbidden discrimination. The invalidity of the order in this aspect is challenged upon two grounds:

(1) That Congress is impotent to control the intrastate charges of an interstate carrier even to the extent necessary to prevent injurious discrimination against interstate traffic; and

(2) That if it be assumed that Congress has this power, still it has not been exercised, and hence the action of the Commission exceeded the limts of the authority which has been conferred upon it." (pp. 349-350.)

The Supreme Court held in part on the first proposition (234 U. S., p. 351, *et seq.*):

"The fact that carriers are instruments of intrastate commerce as well as of interstate commerce, does not derogate from the complete and paramount authority of Congress over the latter or preclude the Federal power from being exerted to prevent the intrastate operations of such carriers from being made a means of injury to that which has been confided to federal care. Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the state, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority and the state, and not the nation, would be supreme within the national field." Citing *Baltimore & O. R. Co.* v. *I. C. C.*, 221 U. S., 612, 618; *Southern R. Co.* v. *U. S.*, 222 U. S., 20, 26, 27; *Second Employers' Liability Cases*, 223 U. S., 48, 51; *I. C. C.* v. *Goodrich Transportation Co.*, 224 U. S., 194, 205, 213; *Minnesota Rate Cases*, 230 U. S., 431; *Illinois Central Railroad Co.* v. *Behrens*, 233 U. S., 473. * * *

"While these decisions, sustaining the Federal power, relate to measures adopted in the interest of safety of persons and property, they illustrate the principle that Congress in the exercise of its paramount power may prevent the common instrumentalities of interstate and intrastate commercial

intercourse from being used in their intrastate operations to the injury of interstate commerce. This is not to say that Congress possesses the authority to regulate the internal commerce of a state, as such, but that it does possess the power to foster and protect interstate commerce, and to take all measures necessary or appropriate to that end, *although intrastate transactions of interstate carriers may thereby be controlled.*

This principle is applicable here. We find no reason to doubt that Congress is entitled to keep the highways of interstate communication open to interstate traffic upon fair and equal terms. That unjust discrimination in the rates of a common carrier, by which one person or locality is unduly favored as another under substantially similar conditions of traffic, constitutes an evil is undeniable; and where this evil consists in the action of an interstate carrier in unreasonably discriminating against interstate traffic over its line, the authority of Congress to prevent it is equally clear. *It is immaterial, so far as the protecting power of Congress is concerned, that the discrimination arises from intrastate rates as compared with interstate rates.* The use of the instrument of interstate commerce in a discriminatory manner so as to inflict injury upon that commerce, or some part thereof, furnishes abundant ground for Federal intervention. Nor can the attempted exercise of state authority alter the matter, where Congress has acted, for a state may not authorize a carrier to do that which Congress is entitled to forbid and has forbidden." (pp. 353-354.)

From the foregoing, it clearly appears that the Supreme Court of South Dakota erred in holding that "if the purported order of the Commission does in any respect regulate intrastate commerce, it is to that extent void owing to the Commission's want of jurisdiction over the subject matter." (Rec., 109.)

PART III. RATES THAT ARE REASONABLE ARE NOT NECESSARILY NONDISCRIMINATORY.

The Supreme Court of South Dakota held (Rec., 109-110):

> "Behind unjust discrimination there always exists unreasonable—that is, unjust and unfair—rates; therefore the sole remedy for unjust discrimination lies in the establishment of reasonable rates. Unreasonable rates being the cause and unjust discrimination the effect, the authority to remove unjust discrimination is to be measured by the authority to prescribe reasonable rates. Every appeal to a commission seeking the termination of discrimination is, in effect, a prayer for the establishment of reasonable rates. Such an appeal cannot be effective unless made to those having authority to prescribe rates." (Rec., 109-110.)

The conclusion reached by the Supreme Court in *Portland Railway Co.* v. *Oregon R. R. Com.*, 229 U. S., 397, 411 (1913), opinion by Mr. Justice Day, is quite to the contrary. The court there quotes approvingly as follows from the opinion of the Supreme Court of Oregon in said case (56 Ore., 487):

> " 'The fact that a rate is *per se* reasonable does not disprove the charge that it is unlawful,' say Messrs. Beale and Wyman in their work on Railroad Regulations at Section 839. 'If rates are relatively unjust, so that undue preference is afforded to one locality or undue prejudice results to another, the law is violated and its penalties incurred, although the higher rate is not in itself excessive.' The question presented for consideration is not the reasonableness *per se* of the charge, but its reasonableness considered in relation to charges made by plaintiff at other localities on its system for like and contemporaneous service; for the statute, as we have construed it, forbids undue preference or discrimination between localities. Circumstances, however, may so explain the difference between rates compared as to deprive the lower rate of any bear-

ing on the higher, but the discrimination, without an excuse recognized by the law, would be in and of itself unjust and unreasonable. Beale and Wyman, Section 838.' "

A rate may be reasonable *per se* and still be unduly preferential of a locality, and thus be violative of Section 3 of the act. (*Judson on Interstate Commerce, Third Edition,* p. 314, Sec. 197.)

In *R. R. Com. of Nev.* v. *S. P. Co.,* 21 I. C. C., 329, 366, quoted with approval in *Topeka Traffic Ass'n.* v. *A. & V. R. Co.,* 27 I. C. C., 428, 436, the Commission said, opinion by Mr. Commissioner Lane:

> "A community is entitled to something more than a reasonable rate; it is entitled to a non-discriminatory rate. The carrier may not say, 'We will give to this community a reasonable rate,' and meet the full requirements of the law; it must view its rates as a whole and see to it that they effect no advantage or preference to one community over another which does not arise necessarily out of the transportation advantages which the one has over the other."

PART IV. RATES MAY BE UNJUSTLY DISCRIMINATORY AND YET NOT CONFISCATORY.

The South Dakota Court held (Rec., 115):

> "While we are of the opinion that the language of the Act to Regulate Commerce is so clear as to admit of little doubt of the legislative intent and that, therefore, the question of expediency is entitled to little or no consideration; yet, in view of the fact that the Supreme Court in the Shreveport case advances the thought that 'Congress alone is competent to deal' with 'the relation of intrastate and interstate rates,' we feel justified in suggesting that there is another power that can be relied upon to prevent injustice. The federal courts, through their power to set aside rates unjust to the interstate carrier, have full control over the only thing that will ever result in unjust discrimination as be-

tween interstate and intrastate traffic—the fixing by the Commission or the Board of a rate that is unjust to the carrier. As before stated, unreasonable rates are the sole cause of unjust discrimination. * * * Moreover, the record herein shows that defendants had sought to have the federal courts restrain the enforcement of such rates upon the ground that they were confiscatory and such relief had been refused. The intrastate rates being conceded to be reasonable as intrastate rates, there can be no unjust discrimination traceable thereto." (Rec., 115.)

The distinction between rates confiscatory and rates unjustly discriminatory is clearly pointed out by the Interstate Commerce Commission in the *Missouri River-Nebraska Cases*, 40 I. C. C., 201, 254 (1916), opinion by Mr. Commissioner Clark, as follows:

"The Nebraska Commission does not question the duty of this Commission to direct the removal of unjust discriminations caused by differences between interstate and intrastate rates. It recognizes our authority under the decision of the Supreme Court in *Houston & Texas Ry.* v. *United States*, 234 U. S., 342, to direct the removal of such discriminations although state rates are increased thereby. It insists, however, that this authority may not be exercised unless the Commission finds, and is justified by the evidence in finding, that the intrastate rates are confiscatory. This position involves the assumption that a state-made rate or system of rates cannot be said to cause unjust discrimination unless it is unlawful for another reason, namely, that it is so low as to deprive the carriers of their property without due process of law or to deny them the equal protection of the laws. Such an assumption finds no support in those sections of the act which define unjust discrimination and undue prejudice, nor can it be justified in practice or on principle. This Commission is frequently called upon to determine whether a relation of rates is unjustly discriminatory where no question is or can be raised as to whether any of the rates involved are confiscatory. The act gives it no authority to determine whether

state-made rates are confiscatory. The position is wholly indefensible that this Commission must inquire into an issue as to which it has no jurisdiction for the purpose of determining a question as to which its jurisdiction is not only complete, but exclusive."

PART V. THE THEORY OF THE COURT BELOW AS TO THE POWER OF THE STATE OVER DOMESTIC TRAFFIC WOULD DESTROY FEDERAL CONTROL OF INTERSTATE COMMERCE. THE RESERVED POWER OF THE STATES TO REGULATE THEIR INTERNAL COMMERCE IS SUBJECT TO THE LIMITATION THEY MUST NOT INTERFERE WITH, BURDEN OR DISCRIMINATE AGAINST INTERSTATE COMMERCE.

The court below (Rec., 110) held:

> "If, under its power to regulate interstate commerce, Congress can and does, even indirectly fix the rates to be charged for intrastate commerce, even though such control professes to be limited in its territorial application, it must from the very necessities of commercial intercourse and competition result, in a conformity of all intrastate rates to those thus prescribed. In other words, there is no such thing as a limited regulation by Congress of the charges for intrastate commerce—wherever Congress steps in, the free action of the local authorities is throttled, as they must of necessity eliminate discrimination and can only do so by conforming all rates to those prescribed by the dominant power."

If we may be permitted, like the court below, to paraphrase the language of others, we indulge in the following paraphrase of the above quoted words:

> **If, under its power to regulate intrastate commerce, the State can and does, even indirectly, fix the rates to be charged for interstate commerce, even though such control professes to be limited in its territorial application, it must from the very necessities of commercial intercourse and competition result in a conformity of all interstate rates to those thus prescribed. In other words, there is no such thing as a limited regulation by the State of the charges**

for interstate commerce—wherever the State steps in, the free action of the federal authorities is throttled, as they must of necessity eliminate discrimination and can only do so by conforming all rates to those prescribed by the State, the inferior power.

Again (Rec., 111), the court below said:

"We do not believe sound logic will permit of the conclusion that, while Congress did not authorize the Commission to directly prescribe intrastate rates and thus establish a unified control over both interstate and intrastate rates, that it did intend to give it the power under the guise of preventing unjust discrimination to exercise exactly the same control. When we contemplate the inevitable result of giving to the Commission a dominant power over intrastate rates in even a limited territory, we must recognize that through the exercise of such power it must exert an indirect influence absolutely controlling the intrastate rates throughout the state. Therefore, in view of all of the above, we do not believe that Congress intended to exert any other power than the power which at that time was conceded by all to have been given to it by the Constitution; and with all due respect to the Supreme Court, we are constrained to differ from it and hold that the proviso in Section 1 of said Act has the effect, just as it prohibits the limiting of 'the provisions of this act' so that no provision, whether it be one found in Section 3 or elsewhere 'shall apply to the transportation of passengers or property * * * wholly within one state * * *.' We think any other construction does violence to the plain wording of such proviso."

Again, paraphrasing the language of the Supreme Court of South Dakota, we have the following:

We do not believe sound logic will permit of the conclusion that while the States did not reserve to themselves the power to directly prescribe interstate rates and thus establish a unified control over both interstate and intrastate rates, that they did intend to reserve the power, under the guise of prescribing the reasonable intrastate rates, to exercise exactly the

same control. When we contemplate the inevitable result of giving to the States a dominant power over intrastate rates without regard to resulting interference with, burdens upon or discrimination against interstate commerce, we must recognize that through the exercise of such power the States must exert an indirect influence absolutely controlling the interstate rates throughout the Union. Therefore, in view of all of the above, we do not believe that the States intended to reserve any other than the power which at that time was conceded by all to have been reserved to them by the Constitution; and with all due respect to the Supreme Court of South Dakota, we are constrained to differ from it and hold that Section 3 of the Commerce Act in prohibiting discrimination against interstate commerce applies as well to the action of the States as to that of the carriers. We think any other construction does violence to the plain wording of Section 3 of the Commerce Act.

We submit that on this point the logic of the following language in the Shreveport case (*Houston & Texas Railway* v. *United States,* 234 U. S., 342, 353-355), is unanswerable:

> "While these decisions sustaining the Federal power relate to measures adopted in the interest of the safety of persons and property, they illustrate the principle that Congress in the exercise of its paramount power may prevent the common instrumentalities of interstate and intrastate commercial intercourse from being used in their intrastate operations to the injury of interstate commerce. This is not to say that Congress possesses the authority to regulate the internal commerce of a state, as such, but that it does possess the power to foster and protect interstate commerce, and to take all measures necessary or appropriate to that end, although intrastate transactions of interstate carriers may thereby be controlled.
>
> This principle is applicable here. We find no reason to doubt that Congress is entitled to keep the highways of interstate communication open to inter-

state traffic upon fair and equal terms. That an unjust discrimination in the rates of a common carrier, by which one person or locality is unduly favored as against another under substantially similar conditions of traffic, constitutes an evil is undeniable; and where this evil consists in the action of an interstate carrier in unreasonably discriminating against interstate traffic over its line, the authority of Congress to prevent it is equally clear. It is immaterial, so far as the protecting power of Congress is concerned, that the discrimination arises from intrastate rates as compared with interstate rates. The use of the instrument of interstate commerce in a discriminatory manner so as to inflict injury upon that commerce, or some part thereof, furnishes abundant ground for Federal intervention. Nor can the attempted exercise of state authority alter the matter, where Congress has acted, for a state may not authorize the carrier to do that which Congress is entitled to forbid and has forbidden.

It is also to be noted—as the government has well said in its argument in support of the Commission's order—that the power to deal with the relation between the two kinds of rates, as a relation, lies exclusively with Congress. It is manifest that the state cannot fix the relation of the carrier's interstate and intrastate charges without directly interfering with the former, unless it simply follows the standard set by Federal authority. This question was presented with respect to the long and short haul provision of the Kentucky constitution, adopted in 1891, which the court had before it in *Louisville & Nashville R. R. Co.* v. *Eubank*, 184 U. S., 27. The state court had construed this provision as embracing a long haul, from a place outside to one within the state, and a shorter haul on the same line and in the same direction between points within the state. This court held that, so construed, the provision was invalid as being a regulation of interstate commerce because 'it linked the interstate rate to the rate for the shorter haul and thus the interstate charge was directly controlled by the state

law.' See 230 U. S., pp. 428, 429. It is for Congress to supply the needed correction where the relation between intrastate and interstate rates presents the evil to be corrected, and this it may do completely by reason of its control over the interstate carrier in all matters having such a close and substantial relation to interstate commerce that it is necessary or appropriate to exercise the control for the effective government of that commerce.

It is also clear that, in removing the injurious discriminations against interstate traffic arising from the relation of intrastate to interstate rates, Congress is not bound to reduce the latter below what it may deem to be a proper standard fair to the carrier and to the public. Otherwise, it could prevent the injury to interstate commerce only by the sacrifice of its judgment as to interstate rates. Congress is entitled to maintain its own standard as to these rates and to forbid any discriminatory action by interstate carriers which will obstruct the freedom of movement of interstate traffic over their lines in accordance with the terms it establishes."

PART VI. THE ORDER OF THE COMMISSION TO REMOVE THE DISCRIMINATION WAS PROPERLY IN THE ALTERNATIVE FORM, ADMITTING OF THE REDUCING OF THE INTERSTATE RATE, OR ADVANCING OF THE INTRASTATE RATE TO BRING ABOUT EQUALITY. MOREOVER, THE COMMISSION IS WITHOUT POWER TO FIX MINIMUM RATES.

The court below (Rec., 118) held:

5. "The Commission did not order that the discrimination be removed by an increase of intrastate rates. True it intimated in its report that such method of removing the discrimination would be justified by the facts. Why then did the Commission so word its order as to leave it optional with the defendants, and why did it omit to prescribe the territory to which its order should apply? May we not fairly presume that it was because the Commission realized that, in order to raise the intrastate rates, the defendants would be under the necessity of ap-

plying for authority to the Board or of establishing in court the unreasonableness of the intrastate rates, and that, if the Board or courts granted relief, it would be for them to prescribe the territory to which the new rates should apply? So construed the validity of the order is beyond question." (Rec., 118.)

In the *Shreveport Case* the Commission's order was made in alternative form and said order was approved by this court. It is necessary for such orders to be in that form because, as was held in the *Minnesota Rate Cases,* 230 U. S., 421, Congress did not prescribe, or authorize the Commission to prescribe, either maximum or minimum rates for intrastate traffic. Neither has the Commission the power to fix minimum rates as applied to interstate traffic. The establishment of an absolute rate is the fixing of a minimum rate.

Wherefore, we respectfully submit that the *Shreveport Case* is decisive of the case at bar; that the doctrine therein announced is sound; and that the Supreme Court should not heed the suggestion of the South Dakota court to overrule said case.

JOHN BARTON PAYNE,
R. B. SCOTT,
A. P. HUMBURG,
As Amici Curiae, on behalf of Illinois Central R. R. Co. et al.

WASHINGTON, D. C., March 26, 1917.

BRIEF FOR DEFENDANT IN ERROR

Supreme Court of the United States

OCTOBER TERM, 1916

No. 302.

AMERICAN EXPRESS COMPANY AND GEORGE C. TAYLOR, INDIVIDUALLY AND AS PRESIDENT OF THE AMERICAN EXPRESS COMPANY, AND WELLS FARGO & COMPANY, PLAINTIFFS IN ERROR,

vs.

STATE OF SOUTH DAKOTA ex rel. CLARENCE C. CALDWELL, AS ATTORNEY GENERAL OF THE STATE OF SOUTH DAKOTA, AND JOHN J. MURPHY, P. W. DOUGHERTY AND WILLIAM G. SMITH, AS AND CONSTITUTING THE BOARD OF RAILROAD COMMISSIONERS OF THE STATE OF SOUTH DAKOTA, DEFENDANT IN ERROR.

In Error to The Supreme Court of the State of South Dakota.

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For Defendant in Error.

(25,732)

INDEX

CASES CITED.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 902.

AMERICAN EXPRESS COMPANY AND GEORGE C. TAYLOR, INDIVIDUALLY AND AS PRESIDENT OF THE AMERICAN EXPRESS COMPANY, AND WELLS FARGO & COMPANY, PLAINTIFFS IN ERROR,

vs.

STATE OF SOUTH DAKOTA **ex rel.** CLARENCE C. CALDWELL, AS ATTORNEY GENERAL OF THE STATE OF SOUTH DAKOTA, AND JOHN J. MURPHY, P. W. DOUGHERTY AND WILLIAM G. SMITH, AS AND CONSTITUTING THE BOARD OF RAILROAD COMMISSIONERS OF THE STATE OF SOUTH DAKOTA, DEFENDANT IN ERROR.

BRIEF AND ARGUMENT OF DEFENDANT IN ERROR.

STATEMENT OF THE ISSUES

The state of South Dakota instituted this suit in the state supreme court in defense of its right to regulate the rates for express transportation wholly within the state. This right had been challenged by the express carriers, plaintiffs in error herein, which were proposing to establish certain intrastate express rates in utter disregard of that right and in open violation of the laws of that state. The attorney general and the board of railroad commissioners, representing the state, prayed the court to issue an injunction restraining the express companies from putting the proposed rates into effect upon the intrastate express traffic. The court granted the injunction. Now the express companies ask the Supreme Court of the United States to say that the supreme court of the state of South Dakota erred, and to dissolve the injunction, in order that the express companies may proceed without molestation to exercise the right, which the state maintains that it possesses, to establish rates for a public service wholly within the

boundaries, and for the benefit solely of the inhabitants of the state.

The control of rates and charges for a service affected with a public interest is a prerogative of government. To deprive a soverign state of that power is to govern it without its consent. To delegate to a private corporation the authority to exercise that prerogative is, to that extent, to destroy self-government, and to supplant its will by the will of a servant or agency of that government, and thereby to subject the creator to the rule of its creature. Such a course, which the plaintiffs in error ask this Court to approve in this case, can be justified only upon grounds of the gravest necessity or in order to preserve a superior right.

The purpose of this action is, therefore, to determine whether or not there exists under the facts and circumstances in this case a necessity so great or other rights so sacred as to require the state of South Dakota to relinquish its undoubted right to prescribe and maintain just and reasonable charges for carrying express freight between stations within its borders.

Simpson v. Sheppard, 230 U. S. 352.
Smyth v. Ames, 169 U. S. 466.
Reagan v. Trust Co., 154 U. S. 413.

The state has endeavored to perform all of its functions in this respect. It has made express rates for its carriers, and the courts have refused to declare the same unlawful. Those rates have remained in effect in this state for more than five years and the express companies have never in that time invoked the means provided by the laws of that state whereby they might have shown such rates to be unreasonable or improper. The board of railroad commissioners of the state is at the present time engaged in an extensive investigation that has for its object the determination of the sufficiency and reasonableness of those rates under present conditions, and the establishing of schedules of just, reasonable and nondiscriminatory rates for express service in the state, if existing schedules shall be found to be improper. On the other hand these express companies, in defiance of those laws, are proposing a radical revision of the rates and are now reluctantly compelled to justify their course of action. These are record facts in this case.

At its biennial session in 1911, the legislature of South Dakota, enacted a statute which conferred upon the board of railroad commissioners the power to formulate and promulgate a uniform schedule of reasonable maximum rates for the transportation of express between points within the state of South Dakota. The provisions of the statute, Chapter 152, Laws of 1911, are as follows:

"Sec. 1. That the board of railroad commissioners of "the state of South Dakota shall, within sixty (60) days after "this act goes into effect, prepare for each of the express "companies doing business in this state at this time or at "any other time hereafter, a uniform schedule or schedules "of reasonable, maximum rates of charges for the transpor-"tation of express freight between stations within this state "over lines of railway wholly within this state, which rates "shall not exceed seventy (70) per cent of the lowest rates "which were in force for the transportation of express "freight over any lines of railway between stations within "this state on the 1st. day of January, 1909. The schedule "or schedules so prepared shall take effect and be in force "at such times as may be specified by said board in its order "adopting such schedule, which shall be in no event later "than ten (10) days after the expiration of the sixty days "above designated."

"Sec. 2. The order of the board of railroad commis-"sioners adopting such schedule or schedules or rates shall "be enforced in the same manner as now provided by law "for the enforcement of any other order made by said "board."

(Transcript p. 3).

Pursuant to the mandate contained in the act of 1911, the board of railroad commissioners on the 2nd. day of May, 1901, made its order specifying a maximum schedule of express rates applicable to express business between points within the state of South Dakota. However, it was possible to enforce this schedule of rates only upon the conclusion of litigation instituted in the circuit court of the United States for the district of South Dakota. These schedules of rates are embraced in the order known as South Dakota Express Distance Tariff No. 2, made to become effective on the 15th. day of May, 1911, and before that date the same were served upon the express companies doing

business in this state. Immediately the express companies brought their suits for injunctions against the enforcement of the order, and alleged that the rates therein prescribed were unreasonable and confiscatory. Applications were made to the court for temporary injunctions, and after a full hearing thereon the circuit court, Judge Willard presiding, on September 7, 1911, denied the applications for temporary injunctions, and thereafter on September 21, 1911, the rates prescribed in the order of the board of railroad commissioners of May 2, 1911, became effective on intrastate express business and the same remain in effect at the present time. These suits in Federal court are still pending, and have never been tried upon their merits and no appeal has ever been taken from any of the orders denying the temporary injunctions. The express companies accepted the said decision and apparently abandoned the said suits; and they thereupon published and established and put into effect and have ever since observed and maintained the said schedules of rates contained in the board's order of May 2, 1911, as their own express rates. The express companies have never at any time, except as hereinafter noted, asked for any modification or change in their intrastate express rates as established by the board of railroad commissioners, and as published and established thereafter by the express companies themselves. (Transcript p. 3-4).

After the conclusion of certain litigation hereinafter referred to, which terminated in the decision of the Interstate Commerce Commission in Traffic Bureau of Sioux City Commercial Club, v. American Express Company, et al., 39 I. C. C. 703, mentioned elsewhere in this brief as the Sioux City Express Case, an informal conference was held on July 27, 1916, at Pierre, between representatives of the express companies, the board of railroad commissioners of this state and representatives of merchants and shippers engaged in wholesale and jobbing businesses at Sioux Falls, Aberdeen, Mitchell, Watertown, and Yankton, South Dakota. At this conference the express companies asked to be permitted to put into effect on all intrastate express business in South Dakota, rates which the Interstate Commerce Commission had previously, in its decision in Re Express Rates, Practices, Accounts and Revenues, 24 I. C. C. 381, authorized the express companies to charge for the interstate transpor-

tation of express between points in different states in the portion of the United States in which South Dakota is situated, described in the decision of the Interstate Commerce Commission, for rate making purposes, as Zone No. 3. At the conference the express companies stated informally that on or before August 15, 1916, they would put into effect on intrastate express shipments between the cities of Sioux Falls, Mitchell, Aberdeen, Watertown and Yankton on the one hand, and all other points and stations on lines of the American Express Company and the Wells Fargo & Company in the state of South Dakota, on the other, the existing interstate rates in effect on express business moving between points in said zone 3. (Transcript 4-5).

As a result of this conference the state board of railroad commissioners, on August 5, 1916, announced its decision and entered an order expressing its determination to enter upon an investigation of the rates, fares, charges, classifications, rules, regulations and practices of the express companies engaged in the transportation of express freight wholly between points within the State of South Dakota. This investigation was undertaken for the reason that the rates which the expres companies had at said conference requested permission to establish throughout the state, would, if permitted to become effective, result in substantial increases in the existing intrastate rates, and the purpose of said investigation was that the board might inform itself as to what rates would be just, reasonable and proper to apply upon intrastate express transportation. The order called a hearing to be held before the board at the city of Pierre, on December 4, 1916. All of the express and railway companies doing business in the state were forthwith served with a copy of the order calling the hearing. Pending the said investigation the board of railroad commissioners refused to grant permission to the express companies to establish intrastate express rates throughout the state of South Dakota on the basis of the interstate rates in effect in zone 3. (Transcript p. 5).

Pursuant to their purpose as declared at said conference, the express companies, acting through their joint agent, F. G. Airy, on August 25, 1916, presented for filing in the office of the state board of railroad commissioners certain tariffs proposing increases and advances in their express rates for the intrastate shipment of express between

the cities of Sioux Falls, Mitchell, Aberdeen, Watertown and Yankton, South Dakota, and all other stations of the defendant express companies within that state. These tariffs were dated August 15, 1916, and were issued to become effective September 15, 1916. Thereupon the board of railroad commissioners adopted a resolution in which it refused to file the said tariffs or any of them, and refused to aprove or allow any of the changes or advances in intrastate express rates proposed in said tariffs, for the reasons, as stated in the resolution, that the said tariffs proposing changes and advances in the established rates, fares and charges had not been filed in the office of the board of railroad commissioners or printed or published in the manner provided by law for a sufficient time to give to the board of railroad commissioners and to the public thirty days notice of the time when and the fact that the same would become effective, prior to the said 15th day of September, 1916, and that said express companies had not obtained the board's approval or allowance of any of the rates, classifications or regulations contained in such tariffs. At this point it should be clearly observed that the tariffs which the board of railroad commissioners refused to file were the tariffs providing the rates involved in this proceeding, which the carriers proposed to make effective between the five cities of Sioux Falls, Mitchell, Aberdeen, Watertown and Yankton, South Dakota, and all other South Dakota stations of the two defendant express companies, which are parties to this action, and that these are the same rates which the express companies stated at the conference on July 27, 1916, that it was their intention to put into effect in South Dakota between the five cities named and other points in the state. The rates which the express companies at that conference asked permission of the board of railroad commissioners to establish on South Dakota intrastate business were those intended to apply between all points within the state. Each of the express companies and their joint agent were notified of the board's refusal to permit said rates to become effective. Nevertheless and notwithstanding the refusal of the board to file said tariffs or to approve the rates or allow the same to go into effect, the express companies did not withdraw the tariffs and were threatening and proposing to put the same into effect at the time when this action was brought in the supreme court of this state. In addition to

the violation of the laws of the state prescribing the manner in which express or other common carriers proposing to advance intrastate rates must proceed, it was made to appear by the complaint in this case that the proposed rates would result in great and irreparable damage to shippers and merchants engaged in wholesale and jobbing businesses at Sioux Falls, Mitchell, Aberdeen, Watertown and Yankton and other points in the state of South Dakota, and would result in establishing express rates on intrastate shipments that would be higher on traffic moving between the five cities named and other stations of the defendant express companies than the express rates contemporaneously in effect between all other stations within the state of South Dakota; that the proposed rates would result in irreparable loss and damage to the sovereign state of South Dakota in that the state in its soverign capacity, through its several departments is a heavy shipper of express between the stations within the state; and that the proposed rates would increase the express charges to the state of South Dakota and to the shippers of the state approximately 68.1%. (Transcript p. 5-8).

The particular provisions of the laws of this state which the express companies sought deliberately to violate are contained in section 10 of chapter 207 of the Session Laws of South Dakota for the year 1911, as amended by chapter 304 of the Session Laws of the state of South Dakota, for the year 1913. This section has been printed in full and appears as Appendix "A" in the brief for plaintiffs in error in this cause, and need not be repeated in this brief. The substance and purport of the section insofar as it relates to the present controversy are as follows:

All common carriers are required to print and keep for public inspection schedules showing the rates which such carriers have established, and which are in force at the time upon their lines. Such schedules must contain the classification in force on such common carrier, and must state separately all special charges and all privileges or facilities allowed and any and all rules or regulations which in any way pertain to the rates, fares or charges. Such schedules must be plainly printed in large type, and a copy for the use of the public must be kept in every office of the common carrier where it can be conveniently inspected. The section provides further, as follows:

"No advance shall be made in the rates, fares and charges "or in joint rates, fares and charges which have been estab- "lished and published as aforesaid by any common carrier or "established or ordered in effect at the time this act shall "take effect by the board of railroad commissioners in com- "pliance with the requirements of this section, except after "thirty (30) days notice to the board and to the public, "published as aforesaid, which shall plainly state the changes "proposed to be made in the schedules then in force, and "the time when the increased rates, fares or charges are "desired, and the proposed changes shall be shown by print- "ing new schedules or shall be plainly indicated upon the "schedules in force at the time and kept for public inspec- "tion. No such change in rates, rules, regulations and prac- "tices shall go into effect until allowed by the board of rail- "road commissioners."

The section further provides that when any common carrier shall have established and published its rates in compliance with the provisions of the section, it shall be unlawful for such common carrier to charge, demand, collect or receive from any person or persons a greater or less compensation for any service rendered than that specified in the published schedules. Penalties are provided for failure on the part of the common carrier to comply with the provisions of the section.

Upon filing the complaint setting up the foregoing facts and upon proper motion therefor, the supreme court of the state on September 12, 1916, issued its order, directed to the defendant express companies, requiring them to show cause before the court on the 2nd. day of October, 1916, why they should not be enjoined pending the determination of said action from putting the proposed rates into effect between the cities of Sioux Falls, Mitchell, Aberdeen, Watertown, and Yankton, South Dakota, and other stations of the defendant express companies in the state. This order contained a restraining order enjoining the defendants, pending a hearing on said order, from putting the proposed rates into effect. (Transcript pp. 11-22).

Upon the return of the order to show cause on October 2, 1916, the entire controversy was by stipulation of the parties submitted to the court for final determination upon its merits. On December 5, 1916, the state court rendered and entered its judgment granting to the plaintiffs in that

court, who are defendants in error herein, a permanent injunction, restraining the defendant express companies from putting the proposed rates into effect, and from applying on intrastate transportation of property by express between points in the state of South Dakota, any rates, fares, charges, classifications, rules, regulations or practices that would result in maximum rates, fares and charges higher than the maximum rates or charges contained in the order made and entered by the board of railroad commissioners on the 2nd. day of May, 1911, pursuant to the provisions of chapter 152 of the Session Laws of 1911, known as South Dakota Express Distance Tariff No. 2, unless or until a schedule of express rates should have first been submitted to the board of railroad commissioners of the state of South Dakota, and should have been regularly approved and allowed by the said board in conformity with the laws of the state of South Dakota. (Transcript pp. 89-90).

Plaintiffs in error in this court contend that the injunction should be set aside, and the state's power to regulate its intrastate express rates should be suspended: (1), because of the decision of the Interstate Commerce Commission in the matter of Express Rates, Practices, Accounts and Revenues, 24 I. C. C. 380; 28 I. C. C. 131, 35 I. C. C. 3, and the decision of the Interstate Commerce Commission in Traffic Bureau of the Sioux City Commercial Club, v. American Express Company, et al., 39 I. C. C. 703; and (2), because the state court had no jurisdiction to entertain this suit.

ARGUMENT AND AUTHORITIES.

1. Interstate Commerce Commission did not establish intrastate rates in its order in the Express Investigation.

The decision of the Interstate Commerce Commission in its general express investigation resulted in the establishment by the Commission of a uniform schedule of rates, classifications, rules and regulations which became effective February 1, 1914, for all of the principal express companies doing business on the railroads in the United States. The schedule of rates thus established was a schedule of maximum rates for interstate express transportation. None of the reports of that investigation and none of the orders entered by the interstate Commerce Commission in any way discussed or referred to the said schedule as an intrastate

schedule of rates, although it is contended for the same that it is of such a nature as to permit of beneficial application to intrastate as well as interstate express business. The point we wish to make in this connection is that no claim was made by or on behalf of the Interstate Commerce Commission at the time when such schedule was promulgated that in making the said express rates, as a result of that investigation, it had the power to prescribe the said rates for application upon intrastate traffic. It is true, however, that these rates have, by the local authorities in a large number of the states of the Union, been permitted to go into effect and to apply upon shipments between points within such states. It is also true that in the application of the Interstate Commerce Commission's schedule to intrastate traffic, various modifications have been made in the original plan. In the third zone, which we take for the purpose of illustration, the plan proposed by the Interstate Commerce Commission provided for a maximum rate of 70c per hundred pounds for an express shipment moving between adjoining sub-blocks. As the result of a conference between representatives of a number of the states and the express companies the latter agreed, and thereafter obtained the consent of the Interstate Commerce Commission, to a modification in this rate which resulted in the establishing of a maximum rate of 55c per 100 pounds to apply upon an express shipment moving between adjoining sub-blocks in zone 3. Since the promulgation of this schedule of rates, upon application of the express companies, the Interstate Commerce Commission in its decision, In the Matter of Express Rates, Practices, Accounts and Revenues, 35 I. C. C. 3, permitted certain increases in the express rates, affecting shipments varying in weight from 1 to 99 pounds.

In a number of the states which have adopted the Interstate Commerce Commission's block and sub-block plan of express rates, modifications in that plan have been made when necessary to correct situations resulting in rates that were plainly unjust to individual localities. A single illustration which is typical of the manner in which these changes have been made by the different state authorities will suffice to show that the Interstate Commerce Commission's plan or schedule of rates is not a rigid or unalterable plan, and that the state authorities, where they have adopted that plan in the main, are reforming the same to meet the

demands of individual cases. The following case is typical: in Gray and Zenter v. American Express Company, 44 W. R. C. Reports at page 17, before the railroad commission of Wisconsin, the express companies contended that they could not satisfy the complaint of a laundry dealer to the effect that the express rate in the amount of 75c per 100 pounds on laundry moved between Manitowac and Green Bay was excessive, without abandoning the Interstate Commerce Commission's block and sub-block plan. In disposing of this contention the Wisconsin Commission said:

"That the Interstate Commerce Commission's method "of computing rates would give the rate now in effect from "Manitowac to Green Bay is entirely true, but it does not "follow that it is the proper rate. Everyone conversant "with the Interstate Commerce Commission's plan of rates "admits there are defects in the system. If the defects en-"countered are due only to a rigid adherence to the method "of computation of rates, the defects should be remedied, "for, if the express companies can put in a higher rate than "the Interstate Commerce Commission would name, it cer-"tainly cannot be maintained that the entire scheme would "fall to pieces if a rate is authorized which is lower than "that body would name."

In that case the express company was ordered to discontinue its charges under scale No. 5 for the transportation of express matter between block 537, sub-block H, and block 538, sub-block O, and to substitute therefor the charges under scale No. 2.

The rates which the express companies proposed in the tariffs offered for filing August 25, 1916, embraced the so-called modified plan and permitted establishment of a 55c first-class rate between the adjoining sub-blocks, and otherwise the rates themselves are those approved by the Interstate Commerce Commission in its suplemental report dated July 14, 1915, which became effective on interstate commerce September 1, 1915. These particular advances in the rates in the weights ranging from 1 to 99 pounds result in rates which exceed those that were in effect between Sioux City and South Dakota points at the time when the Traffic Bureau of Sioux City brought its proceeding against the express companies before the Interstate Commerce Commission. Inasmuch as no supplemental complaint was ever filed by the Traffic Bureau of Sioux City alleging that the

rates as advanced September 1, 1915, when compared with South Dakota intrastate rates resulted in discrimination against Sioux City, we do not understand upon what possible theory the express companies can base their contention that, as to those rates, the order of the Interstate Commerce Commission required the express companies to make them effective. It is true that those rates were in existence when the Interstate Commerce Commission made its order in the Sioux City Express Case, but there was not a scintilla of evidence offered by the complainant or any pleading in that case bringing those rates in issue.

2. The Interstate Commerce Commission Did Establish Interstate Rates in the Express Investigation.

The outstanding fact concerning the Interstate Commerce Commission's general investigation into express rates is, as we have previously noted, that the rates which the commission finally sanctioned, **were maximum rates for interstate transportation by express.** Those rates were embraced in the order which the Interstate Commerce Commision entered June 12, 1912. An examination of the decisions of the Commission in that investigation, reported in 24 I. C. C. 380; 28 I. C. C. 131 and 35 I. C. C. 3, will disclose that the Commission refrained from establishing a single intrastate rate as a result of that investigation. It has never been contended that the Act to Regulate Commerce confers any power on the Interstate Commerce Commission to establish intrastate rates. It is, however, a peculiar circumstance that those schedules of express rates were so stated and arranged as to permit of ready application to intrastate express business. That the Interstate Commerce Commission was quite desirous of having these rates apply universally and uniformly to interstate and intrastate business, is quite clearly indicated in its reports. In the decision of July 14, 1915, 35 I. C. C. 3, at page 4, the Commission said:

"As the result of efforts of petitioners and of state "commissions to make the system uniform, aided in some "instances by modifications of our order, the rates, rules and "regulations prescribed by us have been adopted for intra-"state business in forty states, and more than 90% of the "express business of the country is now being handled "thereunder".

And at page 13 of the same report:

"The present plan has given very general satisfaction

"and has provoked but little complaint. Petitioners have "co-operated earnestly and fairly in an effort to make the "new plan a success and to secure uniformity of rates for "state and interstate business."

In the latest annual report of the Interstate Commerce Commission, in commenting upon conflicts that have arisen between the Interstate Commerce Commission and state railway commissions in matters of rate regulation, the statement is made and reiterated that the Interstate Commerce Commission has not reached out in a spirit of aggression to seize upon "Shreveport situations". We have no reason to doubt the sincerity of those statements, but we do submit that the Interstate Commerce Commission has gone perilously near to that extremity in encouraging the co-operation of the express companies "to secure uniformity of rates for state and interstate business".

> Annual Report of Interstate Commerce Commission for the Year 1916, Page 89.

If it is correct for us to say of the Express Investigation, that it resulted in the promulgation of maximum rates for interstate express traffic only, and that such rates have been modified in various ways when applied in connection with intrastate commerce, and if the Interstate Commerce Commission did not establish those rates in the exercise of any power to promulgate intrastate rates, we fail to see wherein the decision and order of the Interstate Commerce Commission in that proceeding has any bearing upon the issues in this case or constitutes in any way a defense in this action.

If we correctly understand the position of the plaintiffs in error, it is, not that the order of the Interstate Commerce Commission in the Express Investigation is, if we may use the term, self-executing, but it is that when taken into consideration together with the decision of the Interstate Commerce Commission in the Sioux City express case, the two decisions constitute an authorization to these express companies to proceed in utter disregard of the laws of South Dakota in establishing rates upon the basis of the interstate schedule for application upon that state's intrastate business. It is contended, if we understand the situation correctly, that a question of conflict between federal and state authorities arises, and that if such conflict exists, the federal authority must predominate and the state authority must

give away. A determination of this controversy will depend upon a further determination as to whether such conflict in fact exists; and if in fact it does exist, how it has been brought about, and how, if possible, it is to be reconciled without denying, either to the government of the nation or to the government of this state, any of its legitimate rights and powers.

We are brought, therefore, to a consideration of the Sioux City Express Rate Case, 39 I. C. C. 703.

3. The Sioux City Express Rate Case was an attack upon Interstate Rates from Sioux City, not upon Intrastate Rates in South Dakota.

It seems that the order made by the Interstate Commerce Commission in that case will be most easily understood by reference to certain expressions of the Commission in its decision. In the first place it appears that Sioux City's complaint was to the effect that the rates for transportation by express between Sioux City, Iowa and points in the state of South Dakota, were unreasonable and unduly and unreasonably discriminatory against Sioux City when compared with the rates in effect from certain of the more important cities in South Dakota to various points within that state. These allegations, as the commission said: "Are predicated upon comparisons with express rates applicable between Sioux Falls, South Dakota, and other South Dakota cities on one hand and points in that state on the other." Sioux City's prayer was that an order be entered requiring the defendants to publish and maintain express rates between Sioux City and South Dakota points, which should be no higher than those contemporaneously maintained for substantially the same distances between South Dakota cities. It is, therefore, very clear that Sioux City was attacking the interstate rates in effect between Sioux City and South Dakota points, and was asking that the express companies maintain no higher rates between Sioux City and South Dakota stations than those at the same time in effect for the same distances between South Dakota cities. These allegations in Sioux City's complaint ought not to be construed as an attack upon South Dakota intrastate rates, and cannot be given that construction except by an interpretation which negatives the clear purport of the language used in the complaint. The answers of the defendant express

companies in the Sioux City case were to the effect that their interstate express rates were not unreasonable per se, and in these answers the express companies admitted that there existed an unjust discrimination against Sioux City, and alleged that the same was caused by the existing relation of express rates between Sioux City and South Dakota points on the one hand, and between points wholly within South Dakota on the other. The express companies denied that they were responsible for the unjust discrimination, and averred that the same was brought about by reason of the fact that the intrastate express rates in South Dakota, that had been ordered into effect by the board of railroad commissioners of that state, were so much lower than the interstate rates that the discrimination necessarily resulted. For the interpretation of the issues in the Sioux City express rate case, which we have outlined above, we refer to pages 703 and 704 of volume 39 of the Interstate Commerce Commission's reports. In its decision in that case the Commission summarized its findings as follows:

"We accordingly find (1), that the rates for the inter-"state transportation of shipments by express between Sioux "City, Iowa, and points in the state of South Dakota hereto-"fore prescribed by us as reasonable have not been shown "to be unreasonable; (2), that the defendants maintain "higher interstate rates between Sioux City and points in "the state of South Dakota, than between Sioux Falls, Mit-"chell, Aberdeen, Watertown and Yankton, South Dakota, "and points in the same state applicable to shipments by "express which are transported under substantially similar "circumstances and conditions; (3), that **thereby** an undue "preference is given to Sioux Falls, Mitchell, Aberdeen, Wa-"tertown and Yankton, and an undue and unreasonable prej-"udice and disadvantage is effected against Sioux City; (4), "that the defendants should cease and desist from continu-"ing said undue preference and unjust discrimination."

Those findings clearly show that, in harmony with the charges in the complaint of Sioux City, the interstate rates from Sioux City were higher than the intrastate rates between South Dakota points and that **this fact** resulted in an undue preference to South Dakota cities, and an unreasonable prejudice against Sioux City. Likewise, it will be noted that the command of the order was that the defendants

cease and desist from publishing or collecting higher rates for express shipments between Sioux City and South Dakota points than those collected at the some time and under similar conditions between South Dakota points. The express companies say that these findings and this order are tantamount to a command that they must increase certain South Dakota intrastate express rates to the level of the interstate scale, when, as a matter of fact, what the Interstate Commerce Commission did was to find that a discrimination resulted against Sioux City because its interstate rates were higher than the South Dakota intrastate rates and to order that this discrimination be removed by discontinuing the practice of charging higher interstate rates between Sioux City and South Dakota points than the intrastate rates in South Dakota in effect at the same time.

In view of this situation it becomes clear that the proper determination of this action hinges upon the effect of the order of the Interstate Commerce Commission in the so-called Sioux City Express Rate Case. Whether that decision and the order in that case constitute a defense in this action depends entirely upon the proper interpretation of that decision and order.

4. How should order of the Interstate Commerce Commission be interpred?

(a) If it is a positive requirement to establish the I. C. C. Scale in South Dakota, it is void, (1) because of want of power in the Commission; (2) the order does not purport to be such a direction; (3) thus construed the order would bring about greater discrimination than now exists.

(b) If it is only a permission to maintain the I. C. C. Scale in South Dakota, it is no defense in this suit for an injunction, (1) because the proposed rates are not necessary to comply with that order; (2) because investigation by the state commission is necessary to determine a proper adjustment of intrastate rates.

The express companies contend that they could comply with the Interstate Commerce Commission's order only by establishing between the five important cities in South Dakota and other points on their lines in the state, the express rates which were promulgated by the Interstate Commerce Commission in its decision in the Express Investigation. Upon this proposition we take direct issue with the express

companies. We contend that the order in the Sioux City Express Case cannot be construed as tantamount to a positive direction to the express companies to establish the existing interstate rates as intrastate rates in this case for three reasons, all of which clearly show that the order so construed would be void: (1), because of want of power in the Interstate Commerce Commission under the provisions of the act to regulate commerce to make or enforce such an order; (2), the order itself does not purport to command the express companies to establish the Interstate Commerce Commission's scale of interstate rates for application on South Dakota intrastate business; and (3), enforcement of the order so construed would result in an intolerable condition involving numerous unjust and unlawful discriminations in express rates throughout the state of South Dakota, and the order would therefore be void because it would create a situation which the Act to Regulate Commerce declares to be unlawful.

(a) Order Cannot be Construed as Command to place Intrastate Rates on Interstate Level.

(1) Interstate Commerce Commission has no power to prescribe intrastate rates.

We shall consider these propositions in the order stated: First: Does the Interstate Commerce Commission possess power to make an order directing a carrier to establish and prescribe any specific scale of rates to apply upon traffic wholly intrastate?

The first section of the act to regulate commerce contains a clause reading as follows:

"Provided, however, that the provisions of this act shall "not apply to the transportation of persons or property or "to the receiving, delivering, storing or handling of property "wholly within one state and not shipped to or from a for-"eign country from or to any state or territory as aforesaid."

This clause has been construed in different ways by the same tribunals at different times. It is generally agreed that under this provision Congress intended to limit the jurisdiction of the Interstate Commerce Commission, and to preserve for the several states their powers pertaining to the regulation of intrastate rates. The authorities differ as to the extent of that power which Congress intended should remain in the states. In its decision in Rail-

road Commission of Louisiana v. St. Louis & S. W. Ry. Co., 23 I. C. C. 31, the Interstate Commerce Commission held that this proviso did not preserve to the states any right to promulgate or maintain in effect intrastate rates which place a burden upon interstate commerce or which result in a discrimination in favor of an intrastate point and against an interstate point competing in a given area within a state. The Supreme Court of the United States affirmed the decision of the Interstate Commerce Commission in that case, and adopted the Interstate Commerce Commission's construction of that clause in section 1 of the act, in its decision in Houston E. & W. T. R. Co. v. United States, 234 U. S. 342. In this case, commenting upon the proper construction of the provision above quoted the court said:

"Congress thus defined the scope of its regulation and "provided that it was not to extend to purely intrastate "traffic. It did not undertake to authorize the Commission "to prescribe intrastate rates and thus to establish a unified "control by the exercise of rate-making power over both "descriptions of traffic. Undoubtedly, in the absence of a "finding by the Commission of unjust discrimination, intra-"state rates were left to be fixed by the carrier and subject "to the authority of the states, or of the agencies created by "the states. This was the question recently decided by this "court in the Minnesota Rate Cases * * *.

"Here, the Commission expressly found that unjust dis-"crimination existed under substantially similar conditions "of transportation, and the inquiry is whether the Commis-"mission had power to correct it. * * * We are of the opin-"ion that the limitation of the proviso in section 4 does not "apply to a case of this sort."

In this decision the Court held that the Interstate Commerce Commission, in spite of the proviso in section 1, had power to make the remedial order which it had entered in that case. That order the court approved in the following language:

"In order to correct this discrimination the carriers "were directed to desist from charging higher rates for the "transportation of any commodity from Shreveport to "Dallas and Houston, respectively, and intermediate points, "than were contemporaneously charged for the carriage of "such commodity from Dallas and Houston toward Shreve-

"port for equal distances, as the Commission found that rela-"tion of rates to be reasonable. * * * The report states that "under this order it will be the duty of the companies 'to "duly and justly equalize the terms and conditions' upon "which they will extend 'transportation to traffic of a sim-"ilar character, moving into Texas from Shreveport, with "that moving wholly within Texas', but that in effecting "such equalization the class scale rates as prescribed shall "not be exceeded."

In this connection the Court further said:

"Manifestly the order might be complied with, and the "discrimination avoided, either by reducing the interstate "rates from Shreveport to the level of the competing intra-"state rates, or by raising these intrastate rates to the level "of the interstate rates, or by such reduction in one case "and increase in the other as will result in equality."

In concluding its opinion the Court said:

"So far as these interstate rates conformed to what was "found to be reasonable by the Commission, the carriers are "entitled to maintain them, and they are free to comply "with the order by so adjusting the other rates to which "the order relates, as to remove the forbidden discrimina-"tion. But this result they are required to accomplish."

Thus it was held by the Interstate Commerce Commission and affirmed by the Supreme Court that the power of the Interstate Commerce Commission over interstate carriers was ample to enable the Commission to require such carriers to remove a discrimination against interstate commerce brought about by the relation of interstate and intrastate rates. Section 1 of the act was held to contain nothing conflicting with this view of the powers of the Interstate Commerce Commission. It was further held that the interstate carrier could not be compelled to reduce its interstate rates below the standard found by the Commission to be reasonable, but that it was **free to comply with the order by so adjusting the other rates as to remove the forbidden discrimination.** The Supreme Court's opinion is clear upon the proposition that the carriers were required to remove an unjust discrimination, and that in removing the unjust discrimination they would not be obliged to reduce their interstate rates lower than the Interstate Commerce Commission considered reasonable, and that they were free to

remove the discrimination by lowering their interstate rates or increasing their intrastate rates or by the lowering of one and the increasing of the other so as to bring about an equality. Surely it cannot be said of the order involved in the Shreveport case, that it amounted to a positive direction to the railroad companies concerned to place a scale of interstate rates into effect on intrastate business, and that decision is therefore not an authority for the contention in the instant case, as expressed in the brief of the plaintiffs in error, to the effect that the proposed rates were necessary to comply with the order in the Sioux City Case.

The foregoing is pertinent to the inquiry as to whether or not the Interstate Commerce Commission has power to make an order directing the carrier to establish a specific scale of rates for intrastate traffic, because it shows that the Supreme Court did not go to the extent of holding in the Shreveport case that the Commission possessed such power, and it further shows that the proviso in section 1 limits the powers of the Interstate Commerce Commission so that the same do not "extend to purely intrastate traffic", and that Congress "did not undertake to authorize the Commission to prescribe intrastate rates, and thus to establish a unified control by the exercise of the rate-making power over both descriptions of traffic."

In the Minnesota Rate Cases, 230 U. S. 352, the Supreme Court clearly expressed the view that the act to regulate commerce did not confer upon the Interstate Commerce Commission nor take from the several states, the regulation of rates for traffic purely intrastate. In its opinion in that case the Court said, after reviewing at length the history of state and federal legislation affecting the rates and charges of common carriers:

"Congress carefully defined the scope of its regulation, "and expressly provided that it was not to extend to purely "intrastate traffic. In the first section of the act to regulate "commerce there was inserted the following proviso, etc., "* * * Again in 1910, when the act was extended to em- "brace telegraph, telephone and cable companies engaged in "interstate business, the proviso was once more re-enacted "with an additional clause so as to exclude intrastate mes- "sages from the operation of the statute. * * * There was "thus excluded from the provisions of the act that transpor-

"lation which was 'wholly within one state', with the specified qualification where a subject was going to or coming from a foreign country."

Continuing, the Court in the Minnesota Rate Cases said:

"The question we have now before us, essentially, is "whether, after the passage of the Interstate Commerce act, "and its amendment, the state continued to possess the "state-wide authority which it formerly enjoyed to prescribe reasonable rates for its exclusively internal traffic. "* * * Having regard to the terms of the federal statute, "the familiar range of state action at the time it was enacted, "the continued exercise of state authority in the same manner and to the same extent after its enactment, and the "decisions of this court, recognizing and upholding this "authority, we find no foundation for the proposition that "the act to regulate commerce contemplated interference "therewith. * * * Congress did not undertake to say that "the intrastate rates of interstate carriers should be reasonable, or to invest its administrative agency with authority "to determine their reasonableness. Neither by the original "act nor by its amendment did Congress seek to establish a "unified control over interstate and intrastate rates; it did "not set up a standard for interstate rates, or prescribe or "authorize the Commission to prescribe either maximum or "minimum rates for intrastate traffic. It cannot be supposed that Congress sought to accomplish by indirection "that which it expressly disclaimed, or attempted to override the accustomed authority of the states without the provision of a substitute. On the contrary the fixing of reasonable rates for intrastate transportation was left where "it had been found; that is, with the states and the agencies "created by the states to deal with that subject. * * * The "decisions of this court since the passage of the act to regulate commerce have uniformly recognized that it was "competent for the state to fix such rates, applicable "throughout its territory. * * * And the decisions recognizing and defining the state power wholly refute the contention that the making of such rates either constitutes a "direct burden upon interstate commerce or is repugnant "to the Federal statute."

In view of these decisions of the Supreme Court it cannot be said that the order which the Interstate Commerce Commission made in the Sioux City express rate case was

a direction to these express companies to establish the Interstate Commerce Commission's scale of rates upon South Dakota intrastate express traffic. And it follows that in this action, having for its purpose the restraining of the express companies from putting that particular scale of rates into effect in South Dakota, the express companies cannot avail themselves of a defense based upon the false presumption that they have been commanded to establish that scale of rates within the state to apply upon traffic moving wholly within the state. The decisions cited and the plain purport of the proviso in section 1 above referred to squarely refute this contention of plaintiffs in error. The order in the Sioux City express case cannot, therefore, be given the construction that it is tantamount to a positive direction to the express companies to extend their interstate express rates over a portion of the state of South Dakota for application upon intrastate shipments.

At another place in this brief we consider the point that the order made by the Interstate Commerce Commission in the Sioux City express case authorized and permitted the express companies to maintain the interstate express rates in effect while making such adjustments as were necessary in the other rates in order to remove the discrimination found to exist. We there consider also the effect of the order if construed to be of a permissive nature only, as a defense in this action. We are here discussing the contention of the express companies that they were required to establish the Interstate Commerce Commission's rates upon intrastate business in South Dakota in order to comply with the Commission's decision. And our point is that the order cannot receive the construction placed upon it by the express companies, namely, that it is a requirement to establish upon intrastate traffic the rates which the express companies proposed in tariffs that were rejected by the state railroad commission, August 25, 1916.

(2) Order in the Sioux City Express Case does not purport to require Express Companies to establish I. C. C. Scale in South Dakota.

The second reason why the order of the Interstate Commerce Commission is not to be interpreted as a positive requirement that the express companies should establish in South Dakota the proposed rates is that the order in the

Sioux City express case does not purport to have that effect. It merely requires the express companies to remove a discrimination. To be sure the Interstate Commerce Commission in its report stated it was under no doubt as to how the discrimination should be removed, but the fact remains that no language that appears either in the order or the report of the Commission in that case constitutes a command or a direction or a requirement, that the express companies must remove the discrimination in a particular way, namely, by establishing the higher interstate rates for the intrastate traffic. The Commission undertook to do nothing but to require the removal of the unjust discrimination. How that discrimination should be removed is, so far as the order in question indicates, immaterial to the Commission. Nothing in either the report or the order purports even to indicate what would be maximum rates that should be used as a measure by which to remove the alleged discrimination. In this respect the order in the Sioux City case differs from the order of the Commission in the Shreveport case. The Commission in the latter case prescribed the maximum which should not be exceeded by the carriers in removing the discrimination brought about by the relation of intrastate rates in Texas and the interstate rates between Shreveport, Louisiana, and Texas points. Surely there can be no merit in the express companies' contention for a construction of the order in such a way as to give it a meaning which the order itself does not purport should be given to it.

(3) Order in the Sioux City Express Case, if construed as a command to establish I. C. C. Scale on part of South Dakota intrastate traffic, would itself bring about unlawful discriminations.

As a third reason why the order in the Sioux City express case cannot be interpreted as an obligation resting upon the express companies to establish the proposed intrastate rates in South Dakota, we desire to direct the attention of the Court briefly to the fact that the establishment of a given scale of rates between the cities of Aberdeen, Watertown, Mitchell, Sioux Falls and Yankton and other points within the state on the lines of the two defendant express companies, while leaving in effect another and different and lower scale of rates applying upon all other express business moving within the state would result in an intolerable condition burdened with a multitude of unjust discrimina-

tions. If the act to regulate commerce undertakes to authorize the Interstate Commerce Commission to do any one thing, surely it is to remove unjust discriminations, yet the establishment of the proposed scale of rates upon a part only of the business within the state of South Dakota, would undoubtedly have the effect of creating a hundred discriminations to every one that would be removed thereby. The laws of both the United States and this state would be violated by the maladjustment in express rates that would result. We submit that it is not necessary or reasonable to give to the Interstate Commerce Commission's order an interpretation which would render the order impracticable of enforcement without necessitating a further revision of South Dakota intrastate express rates, far beyond the contemplation of the plaintiffs in the Sioux City express rate case and far beyond the power of the Interstate Commerce Commission to require.

(b) Order to be considered only as permission to maintain present Interstate Rates.

(1) Proposed Rates not necessary to comply with the order hence order no defense to injunction.

The defense of the express companies in this action is dependent entirely upon their ability to show that they have been required by the Interstate Commerce Commission's order in the Sioux City express rate case to establish the block and sub-block plan together with the rates proposed in tariffs involved in this action, in South Dakota. We confidently submit that for the reasons outlined above the contention of the express companies for such an interpretation of that order is untenable. The only possible conclusion is, therefore, that the determination by the Commission in Traffic Bureau of Sioux City v. American Express Company, et al. is not tantamount to a positive direction, command or requirement that the express companies shall do the thing which they propose to do; that is, to extend the existing interstate scale and plan of block and sub-block express rates over a portion of the state of South Dakota. With this construction of that order, which is unavoidable, the defense of the express companies in this case fails. The proposed rates are, therefore, not necessary in order to remove the discrimination, and they are not necessary to constitute a compliance by the express companies with the

Commission's order. Other rates would accomplish both purposes. The express companies are free to comply with that order, as was pointed out by Justice Hughes in the Shreveport case, by reducing the higher rates or increasing the lower rates or adjusting the two scales to result in equality. The utmost, therefore, that can be said in support of any interpretation of that order offered by the express companies is, not that the proposed rates are necessary to comply with the order, but that the express companies are permitted or authorized, if need be, to maintain their rates for interstate traffic between Sioux City and South Dakota points at their present level; but in any event they must remove the unlawful discrimination. There is a very serious question as to whether this is a proper construction of the order in question; we contend only that no other construction more favorable to the position of the express companies in this case is possible.

(2) What Intrastate Rates should be established is to be determined by State Authorities.

This order when viewed only as a possible authorization or permission to the express companies to establish the Interstate Commerce Commission's rates on intrastate business, suggests numerous further inquiries. It opens the question as to what rates, what classifications or what regulations of the express companies would be necessary or proper to remove any possible burden upon interstate commerce. Is it the province of the express companies alone to determine these questions of necessity and propriety? Is there any warrant in the law for the contention that the determination of such questions can or should be delegated to a common carrier? And if such powers are delegated, are the powers of both federal and state authorities thereby suspended or completely destroyed insofar as the same may conflict with any determination that may be made by the common carrier subject to regulation? Is there a "twilight zone" between the end of federal authority and the beginning of state authority within which carriers are **permitted** to fix intrastate rates according to their own uncontrolled interests? We have seen that under the proviso contained in section 1 of the act to regulate commerce the Interstate Commerce Commission has been confined in the exercise of its powers to prescribing maximum rates for interstate

traffic. Can the Commission nevertheless delegate to the common carrier the power to prescribe and enforce, in open violation of state laws, such intrastate rates as that carrier may believe to be permissible in order to remove a discrimination against interstate commerce, which might be as well removed by the lowering of interstate rates or by some other adjustment in the conflicting rates?

It must be borne in mind that the order of the Commission in the Sioux City case did not prescribe any specific rates for application on intrastate traffic between any South Dakota stations. In its order in the Shreveport case, 23 I. C. C. 1, reasonable maximum rates were determined and prescribed by the Commission. There is no corresponding provision in the Sioux City case, unless the Commission's finding to the effect that the Interstate Commerce Commission's scale of express rates had not been shown to be unreasonable is equivalent to a finding that that scale of rates was reasonable for application on South Dakota intrastate business. We submit, however, that such a finding is not a compliance with the requirements of the act to regulate commerce as to the form and contents of the report and order required to be made by the Commission upon a determination of any case properly before it. The only authority for the action of the Interstate Commerce Commission in removing unjust discriminations is found in section 15 of the act to regulate commerce as amended by the acts of 1906 and 1910. Insofar as material this section is as follows:

"That whenever, after full hearing upon a complaint "made as provided in section thirteen of this act, or after "full hearing made by the commission on its own initiative, "the commission shall be of opinion that any individual or "joint rates or charges whatsoever demanded, charged or "collected by any common carrier or carriers subject to "the provisions of this act for the transportation of persons "or property or for the transmission of messages by tele-"graph or telephone as defined in the first section of this act, "or that any individual or joint classification, regulations, "or practices whatsoever of such carrier or carriers subject "to the provisions of this act, are unjust or unreasonable or "unjustly discriminatory, or unduly preferential, or preju-"dicial or otherwise in violation of any of the provisions "of this act, the Commission is hereby authorized and em-

"powered to determine and prescribe what will be the just "and reasonable individual or joint rate or rates, charge or "charges, to be thereafter observed in such case as the max- "imum to be charged, and what individual or joint classifi- "cation, regulation or practice is just, fair and reasonable, "to be thereafter followed, and to make an order that the "carrier or carriers shall cease and desist from such viola- "tion to the extent to which the Commission finds the same "to exist, and shall not thereafter publish, demand, or col- "lect any rate or charge for such transportation or trans- "mission in excess of the maximum rate or charge so pre- "scribed, and shall adopt the classification and shall con- "form to and observe the regulation or practice so pre- "scribed."

Under this section the Interstate Commerce Commission is required, if it finds any rates or charges to be unjust or unreasonable or unjustly discriminatory, to first prescribe what will be just and reasonable rates or charges to be thereafter observed, and then and not until then is the Commission authorized to order the carrier to cease and desist from charging or collecting the discriminatory rate. The order in the Sioux City case does not prescribe what shall be just and reasonable rates or charges to or from the five cities named in South Dakota, and it therefore fails in this essential respect to comply with the law. A sufficient reason for the inclusion of this requirement in the statute is that rate-making is the function of government, and no longer rests finally with the carrier. Before the Commission strikes down the existing rate, it must prescribe a new one and not leave to the carrier the making of a new rate, which might be equally discriminatory.

In this case therefore we have this situation. The express companies proposed to establish a scale of intrastate rates to supplant rates regularly established by the proper authorities of the state. The existing rates must be presumed to be reasonable. In an action in Federal court the express companies were unable to show that those rates were confiscatory. The only way, under the law of the state, in which established rates can be increased is by properly posting and publishing the new schedules and obtaining the approval of the state railway commission of the same. This has not been done by the express companies in this instance. They are contending, on the other

hand, that the laws of the state of South Dakota can have no application to their action in making the proposed rates effective. This contention they base upon their construction of the order of the Interstate Commerce Commission. They contend that they are permitted to remove the discrimination without reducing their interstate rates below the existing interstate scale. Not only will the law of the state of South Dakota relating to the manner of increasing intrastate rates be rendered a nullity if the express companies are permitted to increase their rates in this manner, but the resulting situation, insofar as express rates are concerned in the state of South Dakota, will be one of chaos and manifold discriminations. The Interstate Commerce Commission has no authority under the law, and has not attempted, to adjudicate the reasonableness or unreasonableness of existing intrastate rates. It did not in the Sioux City express case adjudicate the reasonableness or otherwise of its interstate scale for application on traffic into or within the state of South Dakota. The Commission did not prescribe in that case any specific rates for application on intrastate traffic. The order in the Sioux City case was entered May 23, 1916, and gave the express companies nearly three months or until August 15, 1916, within which to remove the discrimination. The express companies took no step to comply in any way, even with their extreme interpretation of the order, until August 25, 1916, after having first procured an extension of the effective date of the order to September 15, 1916. In the meantime they took no proceeding to comply with the plain provisions of the law of the state requiring the posting and publishing of the proposed rates and procuring the approval of the board of railroad commissioners thereof. They did not, during that time, proceed before the board of railroad commissioners or in any court to have the intrastate rates adjudged unreasonable or non-compensatory. Their only effort in court in that direction was taken more than four years ago, and resulted in a decision unfavorable to the express companies. It cannot, therefore, be said that the existing intrastate rates are unreasonable; in fact, the presumption is that they are reasonable. This being the case, if any discrimination results,—and the Interstate Commerce Commission has held that it does result from the relation of South Dakota intrastate rates to interstate rates from Sioux

City to South Dakota points,—the cause thereof must be the fact that the interstate rates are unreasonable. And we submit that the fact, elsewhere noted in this brief, that the proposed rates would result in an increase of 68.1% in the express charges of shippers in South Dakota, is a very strong indication that the interstate rates would be unreasonable for application upon intrastate business in South Dakota. If, as was held by the Supreme Court of the United States in Smyth v. Ames, 169 U. S. 466, "it would be unreasonable to reduce the total earning of these roads 29½%", is there not at least a very strong presumption that an increase in the charges to be paid by shippers equal to 68.1% would be unreasonable? It is inconceivable that two different scales of reasonable rates can be in effect in a given territory and yet differ so widely that an unjust discrimination results against the points to which the higher rates apply. The fact that the discrimination exists here has been adjudicated. The fact that the South Dakota intrastate rates are reasonable for intrastate express business must be presumed. The courts have held that the same are not too low to be compensatory. The interstate scale of rates has not been tested as to its reasonableness for application to South Dakota intrastate traffic. There exists no rate-making body possessing any authority under the law to determine that question, except the board of railroad commissioners of the state of South Dakota. Prior to the time when the express companies, on August 25, 1916, submitted their proposed rates to the board of railroad commissioners, that board had already undertaken, on its own motion, an investigation into intrastate express rates, and it had notified the express companies of the hearing in furtherance thereof. Since the order of the Interstate Commerce Commission purports to delegate to the express companies the power to remove the discrimination, this must be held to imply that the discrimination is to be removed in a proper and lawful manner and not by the arbitrary action of the express companies. It was, therefore, under all the circumstances, clearly the duty of the express companies to apply to the board of railroad commissioners, either for permission to put the proposed rates into effect or for an investigation in order that they might prove that the South Dakota express rates are unreasonably low and confiscatory; and in case such application had

been denied, the express companies could have submitted the controvery to and obtained a decision from the courts. After the order in the Sioux City express case and before the time provided for compliance therewith had expired, the express companies were afforded ample opportunity to thus proceed in a lawful and orderly manner. They deliberately adopted a different course. The state supreme court enjoined them, as it would enjoin any other litigant before it who might attempt to over-ride the laws of the state in order to accomplish a given object, when lawful and orderly means were provided whereby such litigant might have accomplished that purpose, if it were a legitimate one.

We submit that even if the order in the Sioux City express case is to be construed as authorizing and permitting the express companies to maintain the existing interstate rates between Sioux City and South Dakota points while they are exercising their own judgment as to how the discrimination should be removed, still that order constitutes no defense in this action, since it clearly appears that the authorization or permission is sufficiently broad to admit of the removal or that discrimination by other means than those adopted by the express companies.

5. Howsoever the order may be interpreted, the Proposed Rates go far beyond any necessity of Removing Discrimination against Sioux City.

When the far-reaching consequences of the express companies' interpretation of the doctrine announced by the United States Supreme Court in the Shreveport case are fully appreciated, we confess we are at loss to understand upon what ground this Court will lend its aid in the application of that doctrine to the facts in the instant case. If the Interstate Commerce Commission's scale is established between five of the important cities in South Dakota and many other points in the state, all of the other state rates will of necessity in time have to be established upon the same basis. In discussing the Shreveport case in view of this situation the state supreme court well said:

"At one fell swoop the Supreme Court, if it shall not "withdraw in some degree from the above, has absolutely "destroyed the power of the states to prescribe maximum "rates for intrastate traffic. It is idle to say that it would "have power over all rates except those dictated by the "Commission. As before noted, the prevention of discrim-

"ination would require it to conform its rates to those pre-
"scribed by the dominant power. We are not questioning
"but that it may be the part of wisdom for the states to
"give to the federal government such power, or if it has
"already given it, then for Congress to so amend its enact-
"ments as to assume the exercise of such power, but it
"seems to us that the question of expediency has no proper
"place in the discussion of either the power possessed by
"Congress or the power exercised by that body. We are
"inclined to believe that the Supreme Court may have un-
"consciously been influenced by the fact that 'the relation
"of intrastate to interstate rates' is * * * a matter * * *
"with which Congress alone is competent to deal. We can-
"not believe that, because the Commission had 'carefully
"examined the question of its authority and decided that
"it had the power to make this remedial order,' the Supreme
"Court should have felt in any manner constrained to fol-
"low such holding. On the contrary, if there is any one
"thing established by experience, it is that courts should
"look with the utmost suspicion upon the holding of any
"person or body as to its own authority—they are prone to
"reach out and assume to themselves authority never in-
"tended to be granted them. We cannot refrain from quot-
"ing the following words of the Supreme Court in the Min-
"nesota case, the underscoring being ours:

"'If the situation has become such * * * that adequate
"regulation of * * * interstate rates cannot be maintained
"without imposing requirements with respect to * * * in-
"trastate rates which substantially affect the former, **it is**
"for Congress to determine, within the limits of its consti-
"tutional authority over interstate commerce and its instru-
"ments the measure of the regulation it should supply. It
"is the function of this court to interpret and apply the law
"already enacted, but not, under the guise of construction,
"to provide a more comprehensive scheme of regulation
"than Congress had decided upon.'"

We cannot believe that the application of the doctrine in the Shreveport case contended for by the express companies in this case can prevail when the consequences are fully measured and appreciated. The proviso in section 1 of the act to regulate commerce will be rendered a meaningless clause should the express companies succeed in impressing their views upon this Court. If their exposition

of the law prevails, in any case hereafter when a common carrier desires an increase in state rates, even though the state rates may be reasonable, and even though the courts may have refused to set those state rates aside, all it will need to do will be to convince the Interstate Commerce Commission that a discrimination is brought about by reason of the fact that certain interstate rates applying to territory within the state are higher than certain of the offending state rates. It will not be necessary even to show that the interstate rates with which comparison is made are reasonable. It will be sufficient for the purposes of the carrier if the said interstate rates have at some time in the past had the approval of the Interstate Commerce Commission. The result will inevitably be the establishing of state rates by the common carriers of the country, not by virtue of the command or requirement, but under permission, of the Interstate Commerce Commission. Thus by indirection Federal authority will accomplish what it is admitted it cannot now accomplish by direct methods. Upon this phase of the subject we can advance no argument more forceful than that contained in the decision of the State Supreme Court, in this case:

"The Supreme Court, in the Shreveport case, says that "Congress 'did not undertake to authorize the Commission "to prescribe intrastate rates, and then to establish a unified "control by the exercise of the rate-making power over "both descriptions of traffic.'

"We do not believe sound logic will permit of the con-"clusion that, while Congress did not authorize the Commis-"sion to directly prescribe intrastate rates and thus establish "a unified control over both interstate and intrastate rates, "that it did intend to give it the power, under the guise of "preventing unjust discriminations, to exercise exactly the "same control. When we contemplate the inevitable result "of giving to the Commission a dominant power over intra-"state rates in even a limited territory, we must recognize "that through the exercise of such power it must exert an "indirect influence absolutely controlling the intrastate "rates throughout the state. Therefore, in view of all the "above, we do not believe that Congress intended to exert "any other than the power which at that time was conceded "by all to have been given to it by the Constitution; and "with all due respect to the Supreme Court, we are con-

"strained to differ from it and hold that the proviso in sec-"tion 1 of said Act has the effect, just as it purports, of "limiting 'the provisions of this act,' so that no provision, "whether it be one found in section 3 or elsewhere, 'shall "apply to the transportation of passengers or property "* * * wholly within one state.' * * * We think any other "construction does violence to the plain wording of such "proviso."

Again, in view of the order made by the Interstate Commerce Commission in the Sioux City express case, and whether that order be construed as a command or as a permission to the express companies to raise rates for intrastate traffic, we submit that in one particular at least it must be conceded that the tariffs proposed by the express companies go beyond the requirement of the order to the effect that the unjust discrimination against Sioux City must be removed. It is clear that the discrimination of which Sioux City was complaining and which the Interstate Commerce Commission found to exist did not obtain thruout the entire state of South Dakota. Sioux City is located near the extreme southeast corner of the state. Aberdeen, one of the South Dakota cities complained of as having a preference, is located near the northern boundary of the state. There certainly is trade territory tributary to Aberdeen, which is not tributary to Sioux City, within which there is no competition between Aberdeen and Sioux City, but in this respect the tariffs offered for filing and which the express companies proposed to put into effect make no distinction. All territories, regardless of the trade centers to which they are tributary, are treated alike. In its decision in this case the Supreme Court pointed out that in the Shreveport case the Commission fixed maxima rates and expressly prescribed the territory within which the same should apply. In the Sioux City case the order was merely to cease "collecting higher rates * * * between Sioux City, Iowa, and points within the State of South Dakota * * *." That court was correct in holding this order too indefinite to support any action by the defendant express companies. The Commission did not select the points to which the higher rates should apply. In concluding upon this point the supreme court of South Dakota stated the law clearly, and as we believe, correctly, as follows:

"Such unjust discrimination, if it existed, must of the

"very necessity be confined to such territory as was com-
"mercially tributary, not only to the five South Dakota cities
"but especially to Sioux City. The commission made no
"finding as to what territory was commercially tributary to
"Sioux City. It did state in the body of its report that
"'The south-eastern section of South Dakota is thus a nat-
"ural and important trade territory for Sioux City ship-
"pers.' This court will take judicial notice of the geog-
"raphy of this state, its lines of railway, the location of these
"several cities. It will also take judicial notice that the
"larger part of this state, while commercially tributary to
"some one or more of the five South Dakota cities named, is
"not, in any respect, commercially tributary to Sioux City;
"furthermore that some portions of this state are not com-
"mercially tributary either to any one of such five cities or
"to Sioux City. Under such circumstances we certainly
"would be remiss in our duty if we allowed the proposed
"schedule to be put in force. Again paraphrasing the words
"of Judge Landis in the case of C. B. & Q. Ry. Co. v. State
"Public Utilities Commission of Illinois:

"'Now, what has the traffic official done when he chose
"to raise the South Dakota rates to the level of the interstate
"rates? He looked carefully over this order of the Com-
"mission, and he found that such order did not prescribe
"the territory to which it was to apply and he believed that
"he need not limit himself to the relief of Sioux City, but
"that he could substitute the interstate rate between the
"five South Dakota cities and all intra-South Dakota points.
"It is true, defendants may call it relieving Sioux City, but
"in no place outside of a court-room, would any man be
"heard to assert that, when you require a shipper to pay
"an increased rate for shipping express from Watertown,
"South Dakota, to South Shore, Florence or Altamont, or
"from Aberdeen to Lemmon, Ordway or Millbank, or from
"any one of the five South Dakota cities named to Edg-
"mont, you are relieving Sioux City of a discrimination.
"What you are doing is relieving the defendants from the
"carrying of goods at a rate that, for the purposes of this
"case, must be presumed to be fair and just to the defend-
"ants, the shipper and the ultimate consumer."

The rates which the express companies have proposed for South Dakota clearly go far beyond any existing necessity for removing discriminations against Sioux City.

In view of all the foregoing considerations, it clearly appears that nothing in the determination of the Interstate Commerce Commission, either in the Express Investigation or in the Sioux City express rate case, constitutes any defense for the unprecedented and high-handed manner in which the express companies now before the Court have sought to saddle upon the shippers of the state of South Dakota, a scheme and scale of express rates, the reasonableness of which has never been considered or determined for application upon intrastate express business within that state.

6. Concerning the Jurisdiction of the Supreme Court of South Dakota.

The plaintiffs in error contend that the Supreme Court of South Dakota had no jurisdiction to entertain this suit. This contention they base upon the further proposition that under provisions of Federal statutes exclusive jurisdiction of all actions to enjoin, set aside, annul or suspend any order of the Interstate Commerce Commission in whole or in part is vested in the district courts of the United States. If this were an action of the nature or for any of the purposes specified in the act of Congress conferring jurisdiction over actions affecting orders of the Interstate Commerce Commission upon federal courts of the United States, we would concede that the state court would have no jurisdiction, but it must be entirely clear that the purpose and point of the present action were not to suspend, annul or set aside the order of the Interstate Commerce Commission in the Sioux City express rate case. This question was raised in the state court by demurrer of the defendants [illegible]

[illegible]

which they proposed to put into effect in South Dakota, without attacking the order of the Interstate Commerce Commission. They do not conceive the possibility that the order of the Interstate Commerce Commission might be valid, and that their interpretation of it might be wrong, and that their course of action thereunder might be illegal and unwarranted. The purpose of this suit is to enjoin the express companies from putting certain proposed intrastate rates into effect. We believe that it is entirely consistent to maintain that suit, without bringing in question the validity of the order of the Interstate Commerce Commission. On the other hand, we also believe that we are not precluded from maintaining in the state court this suit to enjoin the illegal acts of the express companies, even though it may develop that their action is invalid not only for the reason that it violates the laws of the state of South Dakota, but for the further reason that it is based upon an illegal order of the Interstate Commerce Commission. In other words, simply because the question of power of the Interstate Commerce Commission to make the order that it did make in the Sioux City express rate case may be incidentally involved, we do not understand how the state of South Dakota can be precluded thereby from maintaining a suit for injunction in the supreme court of that state to restrain an action of the express companies clearly and concededly in violation of the laws of that state. The judgment of the state Supreme Court is the best evidence of the relief sought by the state and granted by that Court in this case. That document provides that the express companies be "permanently enjoined and restrained from putting into effect the tariffs, tables, classifications, rules, regulations or practices presented by such express companies to the railroad commission of the state of South Dakota, on the 25th. day of August, 1916, or any of the rates, fares or charges specified in said tables, between the cities of Aberdeen, Mitchell, Sioux Falls, Watertown and Yankton, in the state of South Dakota, and other stations of the said express companies in the said state, and enjoined and restrained from putting into effect or applying on intrastate transportation of property by express between any points in the state of South Dakota rates, fares, charges, classifications, rules, regulations or practices that will result in rates, fares and charges greater or higher than the maximum rates or

charges for the transportation of express freight between stations within the state of South Dakota over lines of railway wholly within said state, specified and contained in the order made and entered by the board of railroad commissioners of said state, pursuant to the provisions of Chapter 152 of the Session Laws of 1911, on the second day of May, 1911, and known as South Dakota Express Distance Tariff No. 2, or in the schedule or schedules contained in the said order, unless or until a schedule of express rates shall have first been submitted to the board of railroad commissioners of the state of South Dakota, and have been regularly approved and allowed by said board in conformity to the laws of the state of South Dakota."

It can be said that this judgment vacates, annuls or sets aside the order of the Interstate Commerce Commission, only by one who entertains the belief that the tariffs submitted by the express companies proposed the only rates that could be put in effect in South Dakota that would constitute a compliance with the order of the Interstate Commerce Commission. That this view is entirely erroneous and unwarranted we have shown at another place in this brief. The purpose of this suit was exactly as stated in the prayer of the complaint, where, without mention of or in any referring to the order of the Interstate Commerce Commission in the Sioux City express case, the State Supreme Court was asked to enjoin the express companies from putting into effect the particular rates, regulations and classifications contained in the tariffs and tables that were tendered to the board of railroad commissioners on August 25, 1916. We believe it conclusively appears from the record in this case that other and better methods of complying with the order of the Interstate Commerce Commion than those proposed by the express companies are available, and that such other methods may be employed without raising any serious question concerning the legality of the order of the Interstate Commerce Commission reasonably interpreted.

To substantiate the belief that our views in this regard is in accord with the mature conclusions of the Interstate Commerce Commission, we again direct attention to the Thirtieth Annual Report of that body. Near the close of a rather exhaustive resume of the Shreveport cases, so-called, that have come before the Commission, and of the prin-

ciples involved and the administrative problems presented, the Commission, at pages 89 and 90 of the Report, said:

"Generally speaking, such situations represent rate "questions and economic problems rather than legal contro- "versies and constitutional issues. While we are fully sen- "sible of the vital principles of constitutional and statutory "law which are inherent in certain aspects of such situa- "tions, **we believe that every such case can, as a practical "matter, be disposed of without challenge of these principles "of government."**

The defendant in error respectfully suggests that the plaintiffs in error have failed to show error in the decision or judgment of the state Supreme Court, and ask, therefore, that this Court affirm the same.

Respectfully submitted,

CLARENCE C. CALDWELL,
P. W. DOUGHERTY,
BYRON S. PAYNE,
OLIVER E. SWEET,
Pierre, South Dakota,
For Defendant in Error.

AMERICAN EXPRESS COMPANY ET AL. *v.* STATE OF SOUTH DAKOTA EX REL. CALDWELL, AS ATTORNEY GENERAL OF THE STATE OF SOUTH DAKOTA, ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA.

No. 902. Argued April 13, 1917.—Decided June 11, 1917.

When the Interstate Commerce Commission finds that interstate rates are unduly discriminatory as compared with competitive intrastate rates and orders that the discrimination be abated, a further finding that the interstate rates are not unreasonable implies an authority to the carrier to maintain them and to raise the competitive intrastate rates to their level.

But findings that such discrimination exists and that the interstate rates are reasonable do not necessarily imply a finding that the intrastate rates are unreasonable; both may be reasonable and yet produce discrimination, which is a relative matter.

An order of the Interstate Commerce Commission directing carriers to desist from discriminating against interstate commerce by charging lower rates for local competitive intrastate traffic, may properly leave to the carriers discretion to determine whether the discrimination shall be removed by lowering the interstate rates, or by raising the intrastate rates, or by doing both.

Where the rates which a carrier seeks to alter, in avoiding the discrimination condemned by the Commission, are intrastate rates which have been fixed by state authority, the Commission's order will justify the carrier only in so far as the order makes definite the territory or places to which it applies.

In cases where the dominant federal authority is exerted to affect intrastate rates, it is desirable that the orders of the Commission should be so definite as to the rates and territory to be affected as to preclude misapprehension.

The territorial scope of the order of the Commission here involved is ascertained (the order being on its face somewhat indefinite) by referring from the order to the report accompanying and made part of it, and thence to the maps of the railroads over which the report states the appellant express companies operate.

A state law (Laws South Dakota 1911, c. 207, § 10, as amended by Laws, 1913, c. 304) providing that no advance of intrastate rates may be made except after 30 days' notice filed with a board of railroad commissioners, and published, can not properly apply to changes in intrastate rates which a carrier seeks to make in obedience to an order of the Interstate Commerce Commission, to abate discrimination against interstate traffic.

A suit by a State to enjoin carriers from advancing intrastate rates without first complying with state regulations will not be treated as a suit, beyond the jurisdiction of the state court, "to enforce, set aside, annul, or suspend in whole or in part" an order of the Interstate Commerce Commission (see Commerce Court Act, c. 309, 36 Stat. 539), where the Commission's order covers the proposed advances in part only, is not mentioned in the bill and is not relied on in the answer as justifying them all.

38 S. Dak. —, modified and affirmed.

THE case is stated in the opinion.

Mr. C. O. Bailey and *Mr. Branch P. Kerfoot*, with whom *Mr. T. B. Harrison*, *Mr. J. H. Voorhees* and *Mr. C. W. Stockton* were on the brief, for plaintiffs in error.

Mr. Oliver E. Sweet, with whom *Mr. Clarence C. Caldwell*, Attorney General of the State of South Dakota, *Mr. P. W. Dougherty* and *Mr. Byron S. Payne* were on the brief, for defendants in error.

Mr. Joseph W. Folk and *Mr. Charles W. Needham*, by leave of court, filed a brief as *amici curiæ* on behalf of the Interstate Commerce Commission.

Mr. John Barton Payne, *Mr. R. B. Scott* and *Mr. A. P. Humburg*, by leave of court, filed a brief as *amici curiæ* on behalf of the Illinois Central Railroad Co. *et al.*

MR. JUSTICE BRANDEIS delivered the opinion of the court.

In 1912 the Interstate Commerce Commission entered upon a comprehensive investigation of express rates,

practices, accounts and revenues. Its report [1] resulted in the establishment, on February 1, 1914, throughout the United States, of the so-called uniform zone and block system of rates in interstate transportation and the prompt adoption, in forty States, of the same system in intrastate transportation.[2] South Dakota did not adopt the national system. It adheres to a schedule of maximum express charges, known as Distance Tariff No. 2, which was promulgated by its Board of Railroad Commissioners in 1911, and which, on weighted average, is about forty per cent. lower than the zone and block system. Shippers of Sioux City, Iowa, complained that the differences between these interstate and intrastate scales of rates resulted in unjust discrimination against them to the advantage of their South Dakota competitors. Proceedings to secure relief were brought by them before the Interstate Commerce Commission; and on May 23, 1916, its report and order were filed. *Traffic Bureau of the Sioux City Commercial Club* v. *American Express Company*, 39 I. C. C. 703.

This order,[3] couched in general terms, prohibited charg-

[1] *In the Matter of Express Rates, Practices, Accounts and Revenues*, 24 I. C. C. 380; 28 I. C. C. 132. The order was modified in some respects in 1915; 35 I. C. C. 3.

[2] 28 Ann. Rep. of Interstate Commerce Com., p. 26.

[3] "This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

"*It is ordered*, That the above-named defendants, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before August 15, 1916, and thereafter to abstain, from publishing, demanding, or collecting higher rates for the transportation of shipments by express between Sioux City, Iowa, and points in the state of South Dakota, than are contemporaneously published, demanded, or collected for transportation

ing after August 15, 1916 (later extended to September 15, 1916) "higher rates for the transportation of shipments by express between Sioux City, Iowa, and points in the State of South Dakota, than are contemporaneously . . . demanded . . . for transportation under substantially similar circumstances and conditions for substantially equal distances between Sioux Falls, Mitchell, Aberdeen, Watertown and Yankton, South Dakota, on the one hand, and said points in the State of South Dakota on the other, which said relation of rates has been found by the Commission to be unjustly discriminatory."

The order made "the report containing its findings of fact and conclusions thereon" a part thereof; and the report makes clear that the order applied only to competitive territory, and that this is the southeastern section of South Dakota. The report also declared "that the South Dakota rates are too low to be made the measure of interstate rates between Sioux City and South Dakota points;" that the existing interstate rates "have not been shown to be unreasonable"; that no reason has been presented for modifying them; and that the Commission is "under no doubt as to how the unjust discrimination found to exist should be corrected"; but the report did not expressly state that the intrastate rates should be raised, nor did it enumerate the competitive points in South Dakota to which the rate adjustment should apply.

In July, 1916, the express companies conferred informally with the Board of Railroad Commissioners about introducing in South Dakota complete intrastate tariffs corresponding with the zone and block system scale, and also about introducing special tariffs on that basis covering

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under substaatially similar circumstances and conditions for substantially equal distances between Sioux Falls, Mitchell, Aberdeen, Watertown, and Yankton, S. Dak., on the one hand, and said points in the state of South Dakota, on the other, which said relation of rates has been found by the Commission to be unjustly discriminatory."

rates between the cities of Sioux Falls, Mitchell, Aberdeen, Watertown and Yankton and *all* other points in the State. On August 5 the Board issued an order for a general investigation of express rates; and set for hearing on December 4, 1916, that investigation as well as the applications to put into effect these special or general tariffs. In an opinion then filed, it said:

"The rates which shall be put into effect to remove the discrimination found by the Interstate Commerce Commission to exist in favor of jobbers at Aberdeen, Watertown, Sioux Falls, Mitchell and Yankton, and against Sioux City and its jobbers, have not yet been determined. As these rates are to apply on intrastate traffic and between stations and over lines wholly within this State, this commission [Board] is the proper tribunal to fix these rates. To permit the putting into effect of two systems of rates, one from the cities named and another from all other cities in the State, would create an intolerable situation."

On August 25, the express companies formally presented to the Board the special tariffs, to become effective September 15. And on September 12, the Board formally refused to allow the same to be filed, and rejected them, among other reasons, because the "schedules have not been printed and published, and thirty days' notice of the time when the said proposed classifications, tariffs, tables and schedules shall go into effect has not been given to the Board of Railroad Commissioners of the State of South Dakota, and to the public, as required by the provisions of Section 10 of Chapter 207 of the Laws of 1911."

On the same day the Attorney General of South Dakota and the Board of Railroad Commissioners brought an original proceeding in the Supreme Court of the State against the American Express Company and Wells Fargo & Company to enjoin them from putting into effect the special tariffs covering *all* their rates within the State to

and from the five cities named; and a restraining order was issued. The defendants complied with the restraining order; but filed an answer in which they set up the order of the Interstate Commerce Commission, and alleged that about August 15 they published certain express rate tables, but that "all rates for the carriage of express matter intrastate throughout the State of South Dakota were left the same as provided in the South Dakota Express Distance Tariff No. 2, Exhibit A hereto, excepting the rates to and from the cities of Sioux Falls, Aberdeen, Watertown, Mitchell and Yankton, and other South Dakota points; that to the business between said cities . . . and other South Dakota points there were applied the rates prescribed by the Interstate Commerce Commission, as hereinbefore set forth, for interstate traffic between points within and points without the State of South Dakota; that excepting for the application of the Interstate Commerce Commission rates to traffic to and from said cities . . . no changes were made in the express tariffs throughout the State of South Dakota, as the same had previously existed under the provisions of the South Dakota Distance Tariff No. 2. . . ."

There was in the answer no explicit allegation that no change in rates had been made except as required by the Commission's order.[1]

[1] The answer also alleged that shippers and organizations representing the merchants of the five South Dakota cities had brought suit against these and other express companies in the District Court of the United States for the Northern District of Iowa to enjoin the enforcement of the order of the Interstate Commerce Commission and the putting into effect of the special tariffs above referred to; that on filing the bill an order of notice issued; that the United States and the Interstate Commerce Commission appeared specially to object to the jurisdiction of the court; and that on August 28, three judges sitting, an order was entered as follows: "the plaintiffs with leave of court offer their evidence in support of the application for a temporary writ of injunction and the court finds that upon the showing made the plain-

The plaintiffs demurred to the answer upon the ground that it did not state facts sufficient to constitute a defense to the suit. The demurrer was sustained and defendants having elected to stand on their answer, a perpetual injunction was granted on December 5, which enjoined the express companies from putting into effect the special tariffs presented on August 25, "or any of the rates, fares or charges specified in said tables between the cities of Aberdeen, Mitchell, Sioux Falls, Watertown or Yankton in the State of South Dakota and other stations of said express companies in said State . . . or . . . charges greater . . . than the maximum rates . . . of . . . Distance Tariff No. 2 . . . unless or until a schedule of express rates shall have first been submitted to the Board of Railroad Commissioners of the State of South Dakota and have been regularly approved and allowed by said board in conformity to the laws of the State of South Dakota." [1]

A petition for writ of error to this court was allowed December 11, 1916. The record was filed here January 27, 1917, and included in it is the opinion of the Supreme Court of South Dakota filed in the cause January 20, 1917. The reasons there given for holding that the order of the Interstate Commerce Commission is no justification for disregarding the order of the Board of Railroad Commissioners of South Dakota embody in substance the argument made here on behalf of the State's officials.

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tiffs would not be entitled to a temporary writ of injunction and therefore declines to pass on the plea to the jurisdiction. . . ." See also *Brown Drug Co.* v. *United States*, 235 Fed. Rep. 603.

[1] On December 5, 1916, the defendants had also applied for dissolution of the restraining order, alleging, among other things, that the United States had instituted suit against them in the District Court of the United States for the Southern District of New York to recover the penalties prescribed by Congress, to wit, $5,000 a day for failure to comply with the order of the Interstate Commerce Commission; and that they were liable to further suits.

1. *The nature of the Interstate Commerce Commission's order.*

In its specific direction the order merely prohibits charging higher rates to and from Sioux City than to and from the five South Dakota cities. It could be complied with (a) by reducing the intrastate rates to the South Dakota scale or (b) by raising the South Dakota rates to the interstate scale or (c) by reducing one and raising the other until equality is reached in an intermediate scale. The report (which is made a part of the order) contains, among other things, a finding that the intrastate rate which was prescribed by the Commission was not shown to be unreasonable. This finding gives implied authority to the carriers to increase both to maximum their interstate rates and to raise, to their level, the intrastate rates prevailed. *The Minneapolis, St. Paul & Sault Ste. Marie Ry. Co. v. United States*, 214 U. S. 302. But if the intrastate rates are maintained the discrimination can be removed only by raising the intrastate rates.

But the finding that discrimination exists and that the intrastate rates are unreasonable does not necessarily imply a finding that the interstate rates are unreasonable. Both rates may be within the zone of reasonableness and yet involve unjust discrimination. *Interstate Commerce Commission v. Baltimore & Ohio R. R. Co.*, 145 U. S. 263, 277. Proceedings to remove unjust discrimination are aimed directly only at the offensive rate. It is only a proceeding to unreasonable rate to unreasonable and that rate made reasonable, it is done as a means to the end of removing discrimination. The connection is an indirect one only.

2. *The power of the Interstate Commerce Commission.*

The Supreme Court of South Dakota declares:

"If the prescribed order of the Commission does in any respect prohibit intrastate commerce, it is to that extent

only to the extent that the exercise is found by it to be necessary to remove the existing discrimination against interstate traffic. Still, *certum est quod certum reddi potest.* Whether the order here involved is definite, presents a question of construction which will be considered later.

3. *The requirements of the state law.*

The South Dakota statute (1911, c. 207, § 10, as amended 1913, c. 304) provides that no advance in intrastate rates may be made except after thirty days' notice to the Board of Railroad Commissioners by filing of schedules, and to the public by publication and posting in every office of the carrier in the State. The special tariff here in question, which was presented to the Board informally at conferences in July, was not formally offered for filing until August 25. It was, by its terms, to take effect September 15; and notice to the public was not made as provided in the statute. But these provisions cannot be held to apply to changes in intrastate rates over which the Board has no control. The proper conduct of business would suggest the giving of some notice (as was done by the express companies in the instant case); but a valid order of the Commission is, when applicable, a legal justification for disregarding a conflicting regulation of the state law—because the federal authority is dominant.

4. *The scope of the order.*

If the general words of the order are read alone, they might perhaps be understood as applying to rates between the five named South Dakota cities and *all* other "points" in South Dakota. But the order explicitly makes the report which is filed therewith a part thereof; and the order itself also qualifies the general words used, by the clause: "which said relation of rates has been found by the Commission to be unjustly discriminatory." The report makes it thus perfectly clear that the order applies only to the "points" in competitive territory or,

as the Supreme Court expresses it, those "commercially tributary" both to the five cities and to Sioux City. That territory, as the report also shows, is the southeastern part of South Dakota; and as to this alone, the discrimination was found to exist. The express companies were not warranted by anything in the order in extending the special tariffs of rates, to and from the five cities to include "points" in every part of the State. As to all rate advances other than those in the competitive territory, their action was unauthorized.

It is urged on behalf of the state officials that the order does not show with the necessary precision to what "points" it applies; and that if not wholly void for indefiniteness, it at least cannot serve as a justification for failure to observe the regulations and orders imposed by authority of the State. In cases of this nature, where the dominant federal authority is exerted to affect intrastate rates, it is desirable that the orders of the Interstate Commerce Commission should be so definite as to the rates and territory to be affected as to preclude misapprehension. If an order is believed to lack definiteness an application should be made to the Commission for further specifications. But the order although less explicit than desirable is, when read in connection with the railroad map, not lacking in the requisite definiteness. As the order is limited to the relation of rates to and from Sioux City and to and from the five South Dakota cities "under substantially similar circumstances and conditions and for substantially equal distances," and the report states that the American Express Company operates "over the lines of the Chicago and Northwestern Railway Company and the Chicago, St. Paul, Minneapolis and Omaha Railway Company," and that the Wells Fargo & Company operates "over the Chicago, Milwaukee and St. Paul Railway Company," it furnishes the necessary data for adjusting the rates in controversy.

5. *The jurisdiction of the state court.*

It is urged that the Supreme Court of South Dakota erroneously assumed jurisdiction, because this proceeding is an attack upon an order of the Interstate Commerce Commission; that by the Act of Congress (36 Stat. 539, 540, 543) exclusive power "to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission" was vested in the Commerce Court; and that by the Act of October 22, 1913, abolishing that court (38 Stat. 219), the exclusive power was transferred to the several District Courts. If this were a proceeding professedly "to enjoin, set aside, annul, or suspend" an order of the Commission "in whole or in part," a state court would obviously have no jurisdiction. The bill does not purport to attack, nor does it even refer to, any such order. It alleges only that the express companies propose "increases and advances" in charges for intrastate transportation, by introducing "existing interstate rates." It is the answer which sets up the order of the Commission as a justification; and plaintiffs deny that it is such. Whether or not the state court has jurisdiction cannot, of course, depend upon the professed purpose of the proceeding nor upon the mere form of pleading. An order may be as effectively annulled by misconstruction as by avowedly setting it aside. But we have no occasion to determine in the instant case, under what circumstances and to what extent, the effect of orders of the Commission may be questioned in state courts. The answer does not allege that *all* the intrastate rates to and from the five cities which have been advanced were advanced in compliance with the order of the Commission. It alleges merely that the rates applied were those prescribed "for interstate traffic between points within and points without the State of South Dakota";[1] and it is clear that the

[1] The claim that the express companies attempted to make *only* those changes which were required to comply with the order of the Commis-

special tariffs here in question include advances of rates between the five cities and many "points" in the State to which the Commission's order did not apply. It could not, therefore, afford a justification for putting into effect those intrastate rates without first making the publication required by the state law and securing the approval of the State Board. These rates the Supreme Court of South Dakota had jurisdiction to enjoin, and the decree must be affirmed to that extent. It is also clear that the decree of the Supreme Court, in so far as it enjoined the express companies from advancing *any* intrastate rate to and from the five cities until the same shall have been approved by the South Dakota Board of Railroad Commissioners, was erroneous. So far as it extends to rates in the competitive territory as to which discrimination was found to exist, it must be modified and the injunction dissolved. With this modification the decree of the state court is affirmed and the cause remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE MCKENNA dissents.

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sion was first explicitly made in the petition for writ of error to this court. There was, however, in the motion filed December 5, to dissolve the restraining order, a general allegation that the express companies "were ordered to put into effect the rates restrained" by the state court.